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No. ——

In the Supreme Court of the United States

CARL M. DRURY, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether this Court should remand Petitioner's case for resentencing pursuant to *United States v. Booker* because Petitioner's sentence was enhanced based upon facts not admitted by Petitioner nor found by a jury beyond a reasonable doubt?

II. Regarding a conflict among the Circuit Courts of Appeals, whether or not the jurisdictional element of the former federal murder-for-hire statute, 18 U.S.C. § 1958, required a showing that a facility was actually used in interstate commerce in a manner involving more than a purely incidental or inadvertent crossing of State borders?

LIST OF PARTIES

The caption of the case contains the names of all parties to the proceeding in the court whose judgment is sought to be reviewed.

TABLE OF CONTENTS

Questions Presented for Review i

List of Parties ii

Table of Contents iii

Table of Authorities v

Index to Appendices xi

Opinions Below 1

Statement of Basis for Jurisdiction 1

Constitutional Provisions, Statutes and Sentencing Guidelines Involved in Case 1

Statement of the Case 2

Factual Statement 2

Proceedings Below 3

Reasons for Granting the Petition 5

I. This Court Should Remand Petitioner's Case for Resentencing Pursuant to *United States v. Booker* Because Petitioner's Sentence Was Enhanced Based Upon Facts Not Admitted by Petitioner Nor Found by a Jury Beyond a Reasonable Doubt . . 5

II. This Court Should Resolve a Conflict among the Circuit Courts of Appeals as to Whether the Jurisdictional Element of the Former Federal Murder-for-Hire Statute, 18 U.S.C. § 1958, Required a Showing That a Facility Was Actually Used in Interstate Commerce in a Manner Involving More than a Purely Incidental or Inadvertant Crossing of State Borders 13

Conclusion 28

TABLE OF AUTHORITIES

Cases:

Apprendi v. New Jersey, 530 U.S. 466 (2000) 5, 6

Bethesda Hospital Assn. v. Bowen,
485 U.S. 399 (1988) 16

Blakely v. Washington, ___ U.S. ___,
124 S.Ct. 2531 (2004) . . . . . *passim*

Cleveland v. United States, 531 U.S. 12 (2000) 21

Cohens v. Virginia, 6 Wheat. 264 (1821) 24

Goldberg v. Sweet, 488 U.S. 252 (1989) 25

Griffith v. Kentucky, 479 U.S. 314 (1987) 7, 8, 9

Harper v. Virginia Dept. of Taxation,
509 U.S. 86 (1993) 7

Harris v. United States, 536 U.S. 545 (2002) 6

Johnson v. United States, 529 U.S. 694 (2000) 20

Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) 22

Jones v. United States, 529 U.S. 848 (2000) 21, 22

K Mart Corp. v. Cartier, Inc.,
486 U.S. 281 (1988) 16

Linkletter v. Walker, 381 U.S. 618 (1965) 7

Minneapolis & St. Louis R. Co. v. Winters,
242 U.S. 353 (1917) 17

Offshore Logistics, Inc. v. Tallentire,
477 U.S. 207 (1986) 16

Raygor v. Regents of University of Minnesota,
534 U.S. 533 (2002) 18

Rewis v. United States, 401 U.S. 808 (1971) 21

Reynoldsville Casket Co. v. Hyde,
514 U.S. 749 (1995) 7

Rosen v. Albern Color Research, Inc.,
218 F.Supp. 473 (D.C. Pa. 1963) 17

United States v. Altobella,
442 F.2d 310 (7th Cir. 1971) 19

United States v. Ameline,
400 F.3d 646 (9th Cir. 2005) 9, 12

United States v. Antonakopoulos,
399 F.3d 68 (1st Cir. 2005) 11

United States v. Archer,
486 F.2d 670 (2d Cir. 1973) 25

United States v. Ardley,
242 F.3d 989 (11th Cir. 2000) 7

United States v. Barnett,
398 F.3d 516 (6th Cir. 2005) 11

United States v. Bass, 404 U.S. 336 (1971) 13, 21

United States v. Blackmon,
839 F.2d 900 (2d Cir. 1988) 14

United States v. Booker, ___ U.S. ___,
125 S.Ct. 738 (2005) . . . . . *passim*

United States v. Coates,
949 F.2d 104 (4th Cir. 1991) 25

United States v. Crosby,
397 F.3d 103 (2d Cir. 2005) 8, 11, 12

United States v. Hughes, __ F.3d __,
2005 WL 628224 (4th Cir. March 16, 2005) . . 10, 11

United States v. Johnson, 457 U.S. 537 (1982) 7

United States v. Lopez, 514 U.S. 549 (1995) . . . . . *passim*

United States v. Marek,
238 F.3d 310 (5th Cir.2001) 15, 16, 17, 21

United States v. McDaniel,
398 F.3d 540 (6th Cir. 2005) 12

United States v. Morrison,
529 U.S. 598 (2000) . . . . . *passim*

United States v. Oliver,
397 F.3d 369 (6th Cir. 2005) 9, 10, 11

United States v. Paladino,
401 F.3d 471 (7th Cir. 2005) 9, 11, 12

United States v. Paredes,
950 F. Supp. 584 (S.D.N.Y. 1996) 14, 17, 24, 25
United States v. Pawlinski,
374 F.3d 536 (7th Cir. 2004) 11

United States v. Paz, __ F.3d __,
2005 WL 757876 (11th Cir. Apr. 5, 2005) 12

United States v. Razo-Leora,
961 F.2d 1140 (5th Cir. 1992) 14

United States v. Richeson,
338 F.3d 653 (7th Cir. 2003) 15

United States v. Robinson,
62 F.3d 234 (8th Cir. 1995) 24

United States v. Sigalow,
812 F.2d 783 (2d Cir. 1987) 14

United States v. Stevens,
842 F.Supp. 96 (S.D.N.Y. 1994) 25

United States v. Stonehouse,
452 F.2d 455 (7th Cir. 1971) 16

United States v. Washington,
398 F.3d 306 (4th Cir. 2005) 9, 10, 11

United States v. Weathers,
169 F.3d 336 (6th Cir.1999) 14, 17, 25

United States v. Williams,
299 F.3d 250 (3d Cir. 2002) 14

Will v. Michigan Dept. of State Police,
491 U.S. 58 (1989) 18

Constitutional Provision:

U.S. Const. Amend. VI . . . . . *passim*

Statutes:

18 U.S.C. § 844 . . . . . 13, 21
18 U.S.C. § 922 23
18 U.S.C. § 924 . . . . . 3, 4
18 U.S.C. § 1084 16
18 U.S.C. § 1202 . . . . . 13, 21
28 U.S.C. § 1254 1
18 U.S.C. § 1952 16
18 U.S.C. § 1958 . . . . . *passim*
18 U.S.C. § 2119 24
18 U.S.C. § 3553 . . . . . 6, 11
18 U.S.C. § 3742 6

Sentencing Guidelines:

U.S.S.G. § 2E1.4 9
U.S.S.G. § 3C1.1 . . . . . 2, 4, 9, 10

Other Authorities:

1 J. Bishop, Criminal Procedure (2d ed. 1872) 6

15 C.J.S., Commerce § 41 17

Diane McGimsey, *The Commerce Clause and Federalism After Lopez and Morrison: The Case for Closing the Jurisdictional-Element Loophole*,
90 Cal. L. Rev. 1675 (2002) 23

Ryan K. Stumphauzer, *Electronic Impulses, Digital Signals, and Federal Jurisdiction: Congress's Commerce Clause Power in the Twenty-First Century*, 56 Vand. L. Rev. 277 (2003) 26

INDEX TO APPENDICES

Appendix A - Panel Opinion of the Eleventh Circuit Court of Appeals, issued September 2, 2003 . . . . . 1a

Appendix B - Order of the Eleventh Circuit Court of Appeals Vacating Panel Opinion and Granting Rehearing En Banc, issued February 3, 2004 . . . . 65a

Appendix C - En Banc Opinion of the Eleventh Circuit Court of Appeals, issued January 14, 2005 . . . . . 66a

Appendix D - Panel Opinion of the Eleventh Circuit Court of Appeals, issued January 18, 2005 . . . . . 68a

Appendix E - Motion to Remand for Resentencing Pursuant to *Blakely v. Washington*, filed September 7, 2004 . . . . . 96a

Appendix F - Order of the Eleventh Circuit Court of Appeals Denying Motion to Remand, issued January 18, 2005 . . . . . 103a

Appendix G - Excerpt of Sentencing Hearing in the United States District Court for the Southern District of Georgia, held May 15, 2002 . . . . . 105a

OPINIONS BELOW

The opinions of the Eleventh Circuit Court of Appeals are copied at Appendices A, B, C and D. A copy of the Court of Appeals' order denying Petitioner's motion to remand is copied at Appendix F.

STATEMENT OF BASIS FOR JURISDICTION IN THE UNITED STATES SUPREME COURT

The Eleventh Circuit entered its judgment on January 18, 2005. (Appendix D.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND SENTENCING GUIDELINES INVOLVED IN CASE

The Sixth Amendment to the United States Constitution provides in part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...

18 U.S.C. § 1958 (2003) formerly provided in part:

> (a) Whoever travels in or causes another... to travel in interstate or foreign commerce, or uses or causes another... to use the mail or any facility in interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, or who conspires to do

> so, shall be fined under this title or imprisoned for not more than ten years, or both.
> (b) As used in this section...
> (2) "facility of interstate commerce" includes means of transportation and communication...

§ 3C1.1 (2001) provides:

> If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by 2 levels.

STATEMENT OF THE CASE

A. Factual Statement

In March 2001, Stephen Whatley, an agent with the Bureau Alcohol Tobacco and Firearms ("ATF") and a patient and acquaintance of Petitioner Dr. Carl M. Drury, Jr., moved into Petitioner's home in Brunswick, Georgia, while undergoing a divorce. (R14-178, 162, 294-95, 389-90.)

In August 2001, Whatley approached his supervisor at ATF and claimed that, for a period of months, Petitioner had attempted to solicit Whately's assistance to kill Petitioner's wife. (R14-219-21.) ATF agents instructed Whatley to provide Petitioner with the number of a cellular/mobile/wireless telephone ("cell phone") of an undercover ATF agent, Louis Valoze. The number was a Savannah, Georgia telephone number. (R14-89, 91, 97, 192,

309-11.) The cellular service for the cell phone was provided by VoiceStream Wireless. (R14-234.)

Petitioner subsequently made four telephone calls from a public pay telephone ("payphone") in Brunswick to Agent Valoze's cell phone. All of the calls were made by Petitioner while Petitioner was located within the State of Georgia to Agent Valoze's cell phone while Agent Valoze and the cell phone were also located within the State of Georgia. (R14-135.)

B. Proceedings Below

On September 14, 2001, a federal grand jury for the Southern District of Georgia returned an indictment against Petitioner for four counts of use of an interstate commerce facility in the commission of a murder-for-hire, in violation of 18 U.S.C. § 1958(a) (Counts One through Four), and one count of possession of a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A) (Count Five). The § 1958 counts were based solely on the four calls to Agent Valoze's cell phone.

Petitioner's trial commenced in the United States District Court for the Southern District of Georgia on February 20, 2002. The Government called a witness from BellSouth who testified that the signals from the calls from the payphone in Brunswick were routed by telephone wires to a BellSouth switching center in Brunswick, and then to the destination of the call. (R14-231-32.) A witness from VoiceStream Wireless testified that the signals were then routed from the BellSouth switching center to a VoiceStream switching center in Savannah, and were subsequently routed to another VoiceStream switching center in Jacksonville, Florida. (R14-235.) The signals were then routed to the cell tower located

nearest to the particular cell phone, and then to the cell phone itself. (R14-235-36.) The VoiceStream Wireless representative further testified that if one person placed a call to another person's VoiceStream Wireless cell phone, where the two people were sitting only a few feet apart in a courtroom in Brunswick, the signal would have to first be routed to Jacksonville and then to the cell phone in Brunswick in order to complete the call. (R14-238.)

The jury convicted Petitioner on all counts. At Petitioner's sentencing hearing on May 15, 2002, the sentencing judge enhanced Petitioner's base offense level by two levels for obstruction of justice pursuant to U.S.S.G. § 3C1.1, based upon Petitioner's testimony at trial. The sentencing court further increased Petitioner's sentence by an additional 60 months, pursuant to § 924(c)(1)(D), sentencing him to a total of 204 months. (R-62-63.)

On May 28, 2002, Petitioner timely filed a notice of appeal to the Eleventh Circuit Court of Appeals. On September 2, 2003, a panel of the Court of Appeals issued its opinion. *United States v. Drury*, 344 F.3d 1089 (11th Cir. 2003). (Appendix A.) Petitioner timely filed a petition for rehearing *en banc* on October 7, 2003.

On February 3, 2004, the Court of Appeals vacated the panel's opinion and granted rehearing *en banc*. *United States v. Drury*, 358 F.3d 1280 (11th Cir. 2004) (Appendix B). On June 24, 2004 — the day this Court issued its opinion in *Blakely v. Washington*, ___ U.S. ___, 124 S.Ct. 2531 (2004) — oral arguments were held before the Court of Appeals on rehearing *en banc*. On September 9, 2004, Petitioner filed a motion arguing that the sentencing court's application of enhancements to his sentence, based upon facts not admitted by him nor contained in the jury's verdict, violated the rule of

Blakely and Petitioner's Sixth Amendment rights, and moved the Court of Appeals to remand for resentencing in accordance with *Blakely*. (Appendix E). On January 15, 2005, the *en banc* Court of Appeals issued an opinion vacating its order granting rehearing *en banc*, based on an intervening amendment of 18 U.S.C. § 1958. *United States v. Drury*, 396 F.3d 1143 (11th Cir. 2005) (*en banc*) (Appendix C). On January 18, 2005, a panel of the Court of Appeals issued an opinion affirming Petitioner's conviction. *United States v. Drury*, 396 F.3d 1303 (11th Cir. 2005) (Appendix D). On the same day, the Court of Appeals issued an order denying Petitioner's motion to remand pursuant to *Blakely*. (Appendix F.)

REASONS FOR GRANTING THE PETITION

I. This Court Should Remand Petitioner's Case for Resentencing Pursuant to *United States v. Booker* Because Petitioner's Sentence Was Enhanced Based Upon Facts Not Admitted by Petitioner Nor Found by a Jury Beyond a Reasonable Doubt.

In *Blakely v. Washington*, this Court affirmed its rule from *Apprendi v. New Jersey*, that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." ___ U.S. ___, 124 S.Ct. 2531, 2536 (2004) (quoting 530 U.S. 466, 490 (2000)). As this Court recognized in *Blakely*:

> [T]he "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. [Cits.]. In other words, the relevant "statutory maximum" is not the maximum

> sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," [cit.], and the judge exceeds his proper authority.

Blakely at 2537 (emphasis in original; internal citations omitted) (quoting *Ring v. Arizona*, 536 U.S. 584, 602 (2002); citing *Apprendi* at 483; *Harris v. United States*, 536 U.S. 545, 563 (2002); 1 J. Bishop, Criminal Procedure §87, p. 55 (2d ed. 1872)).

In *United States v. Booker*, the opinion of the constitutional or merits majority, authored by Justice Stevens, extended the rule of *Apprendi* to the United States Sentencing Guidelines ("Guidelines"). *See* ___ U.S. ___, 125 S.Ct. 738, 746, 755 (2005) (Stevens, J.). The Court's second majority opinion in *Booker*, written by Justice Breyer, considered the question of the remedy. 125 S.Ct. at 756 (Breyer, J.). The remedial opinion concluded that "the constitutional jury trial requirement is not compatible with the [federal sentencing act] as written and that some severance and excision are necessary." *Id.* at 758. It proceeded to sever and excise a provision of the federal sentencing statute which made the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), and another provision which depended on the Guidelines' mandatory nature, 18 U.S.C. § 3742(e). *Id.* at 756-57, 764. The severance "ma[de] the Guidelines effectively advisory." *Id.* at 757.

The remedial opinion in *Booker* further expressly applied both the Court's constitutional and remedial holdings "*to all cases on direct review*." 125 S.Ct. at 769 (emphasis added)

(quoting *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987); citing *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 752 (1995); *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 97 (1993)). In this case, Petitioner's sentence was enhanced by the sentencing court on the basis of facts not admitted by Petitioner nor found by the jury beyond a reasonable doubt, pursuant to mandatory Guidelines, in violation *Booker*'s constitutional holding and Petitioner's Sixth Amendment rights.

The Eleventh Circuit Court of Appeals' sole stated ground in its one-paragraph order denying Petitioner's motion for remand and resentencing on the basis of *Blakely* was its "well-established rule that issues not raised in the initial brief are deemed abandoned." (Appendix F, p. 104a) (citing *United States v. Ardley*, 242 F.3d 989, 990 (11th Cir. 2000)). This purported ground for rejecting Petitioner's claim pursuant to *Blakely* that the enhancements to his sentence based on facts not admitted by him nor found by the jury beyond a reasonable doubt violated his Sixth Amendment rights, constituted error in view of the Court's direction in *Booker* that its holdings be applied to *all* cases on direct review. In applying its holdings to all cases on direct review, the Court expressly cited its rule from its decision in *Griffith v. Kentucky* that "'a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases ... *pending on direct review or not yet final*....'" *Booker*, 125 S.Ct. at 769 (emphasis added) (quoting 479 U.S. at 328). Under *Griffith*, a case is "final" when "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." 479 U.S. at 321 n.6 (citing *United States v. Johnson*, 457 U.S. 537, 542 n.8 (1982); citing *Linkletter v. Walker*, 381 U.S. 618, 622 n.5 (1965)).

Pursuant to *Griffith*, Petitioner's case was (and still is) indisputably on "direct" review or appeal, and not "final" at the time the Court of Appeals issued its order. The Court of Appeals' failure to determine Petitioner's motion pursuant to the clear dictates of *Booker* was error. Petitioner further raised the Sixth Amendment challenge to the application of enhancements to his sentence based upon facts not admitted by him nor contained in the jury's verdict well before the Court of Appeals issued its opinion affirming the judgment and its order denying his motion. Significantly, the Court of Appeals' order fails even to cite to *Blakely*, on which Petitioner's motion was grounded, or to *Booker*, of which the Court of Appeals was undoubtedly aware at the time of the issuance of the order. As this Court held in *Griffith*, "the integrity of judicial review requires that [a new rule be] appl[ied]... to all similar cases pending on direct review." 479 U.S. at 322-23. "[F]ailure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." *Id.* at 322. Accordingly, the Court of Appeals' failure to apply this Court's constitutional and remedial holdings in *Booker* violated basic norms of constitutional adjudication and Petitioner's due process rights pursuant to the Fifth Amendment of the United States Constitution.

The Court of Appeals' disregard of this Court's express direction in *Booker* that its constitutional and remedial holdings be applied to all cases on direct review is contrary to the positions of a majority of the Circuit Courts of Appeals applying *Booker*'s holdings. The majority of Circuits to consider the issue have followed this Court's direction and applied *Booker*'s holdings regardless of whether a defendant raised *Booker* or *Blakely* issues in his or her brief. *See United States v. Crosby*, 397 F.3d 103, 106 n.3, 119 (2d Cir. 2005) (despite fact that appellant raised *Booker* claim for the first

time in oral argument and not in his initial brief, holding that because appellant's case was "pending on direct review, *Booker/Fanfan* must be applied to this appeal, [cits.], just as the Supreme Court itself applied *Booker/Fanfan* to the pending appeals of Booker and Fanfan") (internal citations omitted) (citing *Booker*, 125 S.Ct. at 769; *Griffith*, 479 U.S. at 328); *United States v. Oliver*, 397 F.3d 369, 377 n.1 (6th Cir. 2005) (concluding that steps taken by appellant, who did not raise *Booker* claim in initial brief, but asserted claim at oral argument and in letter pursuant to F.R.A.P. 28(j), were sufficient to raise constitutionality of sentence on appeal); *United States v. Ameline*, 400 F.3d 646, 652 (9th Cir. 2005) (concluding "that, although [appellant] did not raise a Sixth Amendment challenge to his sentence in the district court or in his initial brief on appeal, [the Court] may properly consider his post-*Blakely/Booker* Sixth Amendment challenge to his sentence"); *United States v. Washington*, 398 F.3d 306, 312 (4th Cir. 2005) (allowing plain error review when defendant asserted challenge to his sentence for the first time on appeal); *United States v. Paladino*, 401 F.3d 471, 481 (7th Cir. 2005) (holding that because appellants raised *Booker* issues on appeal before judgments became "final," Court could review for "plain error").

In Petitioner's case, the sentencing judge adopted the recommendation of the presentence report and enhanced Petitioner's sentence for obstruction of justice, pursuant to U.S.S.G. § 3C1.1, based upon his alleged false testimony during trial. The judge's application of the enhancement increased Petitioner's offense level from a base offense level of 32, the base offense level applicable to a violation of the federal murder-for-hire statute, 18 U.S.C. § 1958, pursuant to U.S.S.G. § 2E1.4, to an offense level of 34, thus increasing the applicable Guidelines range from 121 to 151

months to a range of 151 to 188 months.[1] Respondent Booker's sentence, like Petitioner's, was also enhanced pursuant to § 3C1.1. *See Booker,* 125 S.Ct. at 746. Following *Booker*, most Circuits have held enhancements for obstruction of justice based upon judicial fact-finding pursuant to mandatory Guidelines and upon facts not admitted by the defendant nor proved to the jury beyond a reasonable doubt constitute plain error, warranting remand for resentencing. *See Oliver*, 397 F.3d at 373, 74, 80-81 (where appellant received a two-level enhancement for obstruction of justice pursuant to § 3C1.1 at sentencing for allegedly leaving a halfway house and drug treatment program, holding that sentencing court "plainly erred by applying the federal sentencing guidelines as mandatory rather than advisory and thereby sentencing [the defendant] beyond the sentencing range which the jury verdict and [the defendant's] criminal history supported"); *Washington*, 398 F.3d at 312 ("[t]he § 3C1.1 enhancement resulted in a sentence exceeding the maximum ... authorized by the jury verdict pursuant to the then-mandatory Guidelines regime. And the facts underlying the enhancement were not proved to the jury beyond a reasonable doubt, but were found by the sentencing judge by a preponderance of the evidence."); *United States v. Hughes*, ___ F.3d ___, 2005 WL 628224, *1-2, *5, *17 (4th Cir. March 16, 2005) (holding that, although district court did not err in calculating the defendant's sentencing range under the Guidelines, remand for resentencing was required pursuant to *Booker* where district court applied enhancements for amount

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[1] 1. After applying the enhancement for obstruction of justice pursuant to U.S.S.G. § 3C1.1, the sentencing court departed downward seven months based on multiple mitigating factors found by the court not to have been adequately considered by the Sentencing Commission in the formulation of the Guidelines. (Appendix F, p.108a.)

of loss, more than minimal planning, for commission of offense during bankruptcy proceeding, and for obstruction of justice, thus exceeding the maximum sentence authorized by the facts contained in the jury's verdict alone); *Crosby*, 397 F.3d at 105, 119-120 (remanding case where district court applied enhancements for using a firearm in connection with another felony and for obstruction of justice to determine whether resentencing was required, based upon holding that "[t]he District Judge, sentencing before *Booker/Fanfan*, quite understandably committed a Sixth Amendment error by mandatorily selecting a sentence dictated by the applicable Guidelines range, which had been calculated on the basis of facts not found by a jury or admitted by the Defendant").

The sentencing court clearly committed *Booker* error in sentencing Petitioner based upon facts found by the sentencing judge, and not facts admitted by Petitioner nor found by the jury beyond a reasonable doubt, *see Crosby*, 397 F.3d at 114; *Washington*, 398 F.3d at 312; *Oliver*, 397 F.3d at 378; *Paladino*, 401 F.3d 471, 483 (citing *United States v. Pawlinski*, 374 F.3d 536, 541 (7th Cir. 2004)); and also committed error by sentencing Petitioner pursuant to "mandatory" Guidelines, *see United States v. Antonakopoulos*, 399 F.3d 68, 77 (1st Cir. 2005); *Crosby*, 397 F.3d at 114-15; *United States v. Barnett*, 398 F.3d 516, 525 (6th Cir. 2005); *see also Hughes*, ___ F.3d ___, 2005 WL 628224 at *10 ("[A]fter *Booker*, there are *two* potential errors in a sentence imposed pursuant to the pre-*Booker* mandatory guidelines regime: a Sixth Amendment error ... and an error in failing to treat the guidelines as advisory....") (emphasis added). The sentencing court also gave numerous indications that it would have imposed a lesser sentence based on factors similar to those enumerated in 18 U.S.C. § 3553(a), had it not felt itself constrained by the dictates of mandatory Guidelines, in addition to the grant of a slight

departure from the Guidelines range. (Appendix G, p. 106a-108a) "[T]he argument for remand is especially strong in cases... in which the district judge specifically noted during sentencing his dissatisfaction with the constraints imposed by the Guidelines." *United States v. McDaniel*, 398 F.3d 540, 550 n.8 (6th Cir. 2005); *see also United States v. Paz*, ___ F.3d ___, 2005 WL 757876, *2 (11th Cir. Apr. 5, 2005) (noting that district court's statement that, if guidelines had been unconstitutional, it would have sentenced appellant to term of only six months of imprisonment, instead of the 10 months actually imposed, meant that "[t]he constitutional error, therefore, affected [appellant's] substantial rights beyond a reasonable doubt").

The Court of Appeals' failure to apply *Booker* to the constitutional error raised by Petitioner while his case is pending on direct review and is not final is directly contrary to this Court's remedial holding. The sentencing court's increase of Petitioner's sentence based upon judicial fact-finding pursuant to mandatory Guidelines, and upon facts not admitted to by Petitioner nor found by a jury beyond a reasonable doubt, warrants that his Petition be granted, and that his sentence be vacated and remanded in light of this Court's decision in *Booker*. Petitioner notes that this Court has, as of the time of the filing of this Petition, issued over 500 orders granting petitions raising *Booker*, vacating the judgment of the lower court and remanding for consideration in light of *Booker*. Furthermore, many Circuits have held that the proper response to asserted *Booker* error is to remand the case either for resentencing, or for determination of whether resentencing is required. *See Crosby*, 397 F.3d at 117; *Paladino*, 401 F.3d at 484; *Ameline*, 400 F.3d at 655 ("it is the *truly* exceptional case that will not require remand for resentencing under the new advisory guideline regime") (emphasis in original).

II. This Court Should Resolve a Conflict Among the Circuit Courts of Appeals as to Whether the Jurisdictional Element of the Former Federal Murder-for-Hire Statute, 18 U.S.C. § 1958, Required a Showing That a Facility Was Actually Used in Interstate Commerce Is a Manner Involving More than a Purely Incidental or Inadvertant Crossing of State Borders.

The Court further should grant certiorari to resolve a conflict among the Circuit Courts of Appeals regarding the nexus to interstate commerce necessary to establish the jurisdictional requirement of the former federal murder-for-hire statute, 18 U.S.C. § 1958 (2003), especially in view of the principles of federalism emphasized by this Court in *United States v. Lopez*, 514 U.S. 549 (1995), *Jones v. United States*, 529 U.S. 848 (2000) and *United States v. Morrison*, 529 U.S. 598 (2000). *See United States v. Bass*, 404 U.S. 336, 337, 38 (1971) (granting certiorari to resolve conflict among courts as to jurisdictional requirement of 18 U.S.C. § 1202(a), prohibiting any felon from transporting "in commerce or affecting commerce... any firearm..."); *Jones*, 529 U.S. at 851-52 (granting certiorari to resolve the question of whether 18 U.S.C. § 844(i), which prohibited the damaging or destruction "by means of fire or an explosive, [of] any ... property used in interstate or foreign commerce...," applied to a private residence). Petitioner was prosecuted and convicted pursuant to former § 1958(a), which at the time provided, in pertinent part:

> Whoever travels in or causes another ... to travel in interstate or foreign commerce, or uses or causes another ... to use the mail or any facility *in* interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the

> United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, or who conspires to do so, shall be fined under this title or imprisoned for not more than ten years, or both.

18 U.S.C. § 1958(a) (emphasis added). The "use[s] ... any facility *in* interstate or foreign commerce" requirement has been held to constitute a jurisdictional element, as well as an element of the offense. *United States v. Paredes*, 950 F.Supp. 584, 585 (S.D.N.Y. 1996) (citing *United States v. Razo-Leora*, 961 F.2d 1140, 1148 (5th Cir. 1992)); *United States v. Sigalow*, 812 F.2d 783, 785-86 (2d Cir. 1987); *United States v. Blackmon*, 839 F.2d 900 (2d Cir. 1988)). The jurisdictional element must be proven beyond a reasonable doubt. *See United States v. Williams*, 299 F.3d 250, 253 (3d Cir. 2002) (citation omitted).

There is a conflict among the Circuit Courts of Appeals as to the interpretation of this jurisdictional element of the former § 1958. The Eleventh Circuit Court of Appeals has recognized that former § 1958 appears to be ambiguous as a result of the fact that § 1958(a) contains the prepositional phrase "*in* interstate commerce," while § 1958(b) contains the phrase "*of* interstate commerce," noting that the former appears to describe the manner in which the facility is used, while the latter appears to describe the type of facility used. The Eleventh Circuit has indicated that the facility must be actually used in interstate commerce. (Appendix A, p. 15a, 26a and Appendix D, p. 78a-79a, 81a-82a). The Sixth Circuit, in *United States v. Weathers*, 169 F.3d 336, 342 (6th Cir. 1999), has held that a defendant must use a facility capable of use in interstate commerce in an interstate manner. The Fifth Circuit has held that "the *facility*, not its use, is what must be 'in interstate or foreign commerce.'" *United*

States v. Marek 238 F.3d 310, 320 (emphasis in original). The Seventh Circuit is in accord with the Fifth Circuit. *United States v. Richeson*, 338 F.3d 653, 660 (7th Cir. 2003). *See also* Appendix D, p. 78a (Eleventh Circuit acknowledging circuit conflict).

As the Court of Appeals noted in its January 14, 2005 *en banc* opinion, in December 2004, Congress amended § 1958(a) as part of the Intelligence Reform and Terrorism Prevention Act of 2004, changing the phrase "facility in" to "facility of." (Appendix C, p. 67a.) *See also* Intelligence Reform and Terrorism Prevention Act of 2004, § 6704, Pub.L. No. 108-458, 118 Stat. 3638 (2004). In its January 18, 2005, panel opinion, the Court of Appeals stated that the amendment "ma[de] the statute's jurisdictional reach crystal clear. (Appendix D, p. 79a.) However, it acknowledged that it was required to decide Petitioner's challenge to his conviction under the former version of § 1958. (*Id.*, p. 80a.) A panel of the Court of Appeals then proceeded to hold that the signals from the calls from Petitioner, who was located within the State of Georgia, to Agent Valoze, who was located within the State of Georgia, which inadvertently and incidentally traveled from Georgia to Florida and back to Georgia, constituted sufficient use of a facility in an interstate manner to satisfy the jurisdictional element of former § 1598(a). (*Id.*, p. 83a.)

The Court of Appeals' holding is contrary to the meaning of former § 1958(a), Congress' clear intent in enacting the federal murder-for-hire statute, the traditional balance between the states and the federal government in the area of criminal law, and the principles of federalism emphasized by this Court in *Lopez*. As this Court has held, "[i]n ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language

and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (citing *Bethesda Hospital Assn. v. Bowen*, 485 U.S. 399, 403-05 (1988); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 220-21 (1986)). The plain meaning and context of former § 1958 confirms that actual use of a facility in interstate commerce is required to establish the jurisdictional element. The first section of § 1958(a) reads "[w]hoever *travels* in or causes another... to travel *in interstate or foreign commerce*..." 18 U.S.C. 1958(a) (emphasis added). The phrase "in interstate commerce" in this portion of § 1958(a) clearly modifies the verb "travel." *See Marek*, 238 F. 3d at 325 (Jolly, J., dissenting). If Congress is presumed to have employed the phrase consistently throughout § 1958(a), then the phrase modifies the preceding verb "use," and not the preceding noun "facility." *See id. See also United States v. Stonehouse*, 452 F.2d 455, 456-57 (7th Cir. 1971) (holding that phrase "transmission in interstate ... commerce" in 18 U.S.C. § 1084(a) modified verb "uses," rather than immediately preceding noun "wire communication facility"). It follows that, to read the substantive provision in former § 1958(a) consistently, it must be read to require that a facility *actually be used in* interstate commerce.

This Court noted the distinction in its opinion in *Lopez* between "an instrumentality *of* interstate commerce or a thing *in* interstate commerce." 514 U.S. 549, 559 (1995) (emphasis added); *accord Marek* at 326 (Jolly, J., dissenting). Furthermore, the Sixth Circuit, in interpreting the Travel Act, 18 U.S.C. § 1952, of which the federal murder-for-hire statute was originally a subpart, has recognized that "a statute that speaks in terms of an instrumentality *in* interstate commerce rather than an instrumentality *of* interstate commerce is intended to apply to interstate activities only." *United States v. Barry*, 888 F.2d 1092, 1095 (6th Cir. 1989)

(emphasis in original). Also, use of the term "facility" in § 1958 further supports a conclusion that the phrase to "use[ ]... a facility in interstate commerce" means actual interstate use. A telephone is an "instrument" of interstate commerce. *See Rosen v. Albern Color Research, Inc.*, 218 F.Supp. 473, 476 (D.C. Pa. 1963) (citing 15 C.J.S., Commerce § 41). As the Court has held, an instrumentality's "... character as an instrument of commerce depend[s] on its employment at the time..." *Minneapolis & St. Louis R. Co. v. Winters*, 242 U.S. 353, 357 (1917). The Court's definition of an instrumentality has been relied upon to hold that the jurisdictional element of former § 1958(a) "turns not on the facility's interstate capacity but *its actual use in the particular case." Paredes*, 950 F. Supp. at 587 (emphasis added) (citing *Minneapolis & St. Louis R. Co*, at 357; *Rose*, at 476; 15A Am. Jur.2d, Commerce § 8). The jurisdictional element to § 1958(a) therefore clearly requires *actual use* of a facility in an interstate manner. *See Weathers*, 169 F.3d at 342.

Former § 1958(a) is further capable of being read consistently with § 1958(b)(2). Congress' use of the word "includes," followed by specific facilities, has been held to mean that § 1958(b)(2) merely contains examples of facilities which are capable of actual use in interstate commerce for the purpose of § 1958(a). *See Drury*, 344 F.3d at 1100; *Marek*, 238 F.3d at 324.

Even if § 1958 is held to be ambiguous, the relevant canons of statutory construction strongly support a conclusion that not only is actual use of a facility in an interstate manner required to establish the former murder-for-hire statute's jurisdictional element, but that such interstate use must involve more than a mere incidental or inadvertent crossing of state borders. As the Court has recognized, pursuant to the clear statement rule, if a statute is intended to "alter the 'usual

constitutional balance between the states and the Federal Government,' Congress must make its intention to do so 'unmistakably clear in the language of the statute.'" *Raygor v. Regents of University of Minnesota*, 534 U.S. 533, 543 (2002) (quoting *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989)).

Congress, as reflected in § 1958's legislative history, made repeated, express "clear statements" of its intent *not* to alter the constitutional balance between the states and the federal government, in enacting § 1958. The Senate Report stated that:

> *Federal jurisdiction should be asserted selectively* based on such factors as the type of defendants reasonably believed to be involved and the relative ability of the federal and state authorities to investigate and prosecute. For example, the apparent involvement of *organized crime figures* or the lack of effective local investigation because of *the interstate features of the crime* could indicate that federal action was appropriate....

S. Rep. No. 98-225 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3484 (emphasis added). It recognized that state and local law enforcement and courts were "quite capable of handling a murder-for-hire case notwithstanding the presence of some interstate aspects," and expressed its concern that the federal government would "usurp" prosecutions which were properly left to the state authorities. *Id.* Congress accordingly expressly stated its intent that the exercise of federal jurisdiction under the statute be limited to "*significant*" cases with more than merely "*some interstate aspects.*" *Id.* (emphasis added).

Moreover, then-Attorney General Robert F. Kennedy explained that the intended reach of the Travel Act, of which § 1958 was originally part, was "[to] impose criminal sanctions upon the person *whose work takes him across State or National boundaries* in aid of certain 'unlawful activities.'" Letter from Robert F. Kennedy, Attorney General, to the Vice President (Apr. 6, 1961), S. Rep. No. 87-644 at 4 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2664, 2666 (Attorney General Letter of 1961) (emphasis added). The Attorney General further stated that, "Because many rackets are conducted by highly organized syndicates *whose influence extends over State and National borders,* the Federal Government should come to the aid of local law enforcement authorities in an effort to stem such activity." *Id.* (emphasis added). *See also United States v. Altobella,* 442 F.2d 310, 314 n.7 (7th Cir. 1971).

These clear statements regarding the scope of federal jurisdiction under both the federal murder-for-hire statute and the Travel Act plainly demonstrate that federal jurisdiction under former § 1958(a) was never intended by Congress to extend to predominantly *intrastate* murder-for-hire schemes. To the contrary, it is apparent that in enacting § 1958, Congress intended to confine the assertion of federal jurisdiction to cases involving criminal organizations whose criminal activities crossed state lines and included murder-for-hire. Congress' express statement that jurisdiction under former § 1958 be limited to "significant" cases with more than merely "some interstate aspects" clearly indicates that it intended for the exercise of federal jurisdiction only in cases with a significant connection to interstate commerce. Pursuant to Congress' express intent, and in the absence of any "unmistakably" clear statement to the contrary, § 1958(a) must therefore be narrowly interpreted to require a meaningful nexus to interstate commerce in order to satisfy

the jurisdictional requirement. In contrast, a broad interpretation of former § 1958 would alter or change "the sensitive relation between federal and state criminal jurisdiction." *Lopez*, 514 U.S. at 561 (quoting *United States v. Enmons*, 410 U.S. 336, 411-12 (1973)); *see also Drury*, 344 F.3d. at 1101. "[N]othing is better settled, than that statutes should receive a sensible construction, *such as will effectuate the legislative intention*, and, if possible, so as to avoid an unjust or an absurd conclusion." *Johnson v. United States*, 529 U.S. 694, 707 n.9 (2000) (emphasis added).

The offense in this case was purely an *intrastate* offense. The sole interstate features were the routing of incidental and inadvertent signals instantaneously from Georgia, to a switching center in Florida, and back into Georgia. The exercise of federal jurisdiction cannot be held to have been "selectively asserted" based upon the "interstate features of the crime." 1984 U.S.C.C.A.N. at 3484. Moreover, there is no reason state authorities would not have been entirely capable of conducting the prosecution of the offense. It simply cannot be construed as the sort of organized criminal activity, extending across state borders, and utilizing murder-for-hire, which Congress clearly envisioned in enacting § 1958.

It is further significant that the legislative history to the 2004 amendments to § 1958—in sharp contrast to the history to the 1984 enactment—is devoid of any findings concerning any effect on the balance between the federal government and the states. The sole explanation for the change is contained in a House Report on a bill for Terrorism Transcending National Boundaries Correction Act of 2003, which states that the bill:

> [I]ncorporates a technical corrections bill that would correct an erroneous definition in 18 U.S.C. § 1958(b)(2) which proscribes murder for hire in

> interstate or foreign commerce, *but only defines "facilities of interstate commerce," omitting "foreign commerce."* This section would insert "or foreign" and the law would correctly read as "facility of interstate or foreign commerce' for the definition.

H.R. Rep. No. 108-505 at 7 (2004) (emphasis added). Clearly, the proponents of the amendments were more concerned about murder-for-hire in furtherance of international terrorism than any constitutional balance between the federal and state governments.

A narrow construction of § 1958(a)'s jurisdictional requirement is further supported by the rule that any "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Cleveland v. United States*, 531 U.S. 12, 24 (2000). This Court has relied upon the rule of lenity to narrowly construe the jurisdictional element of the Travel Act, *see Rewis v. United States*, 401 U.S. 808, 812 (1971); § 1202(a) of the Omnibus Crime Control and Safe Streets Act, *see Bass*, 404 U.S. 336; and the federal arson statute, § 844(i), *see Jones*, 529 U.S. at 858. Courts have accordingly invoked the rule in support of a narrow interpretation of the jurisdictional element of § 1958 as well. *See Marek*, 238 F.3d at 327-28 (Jolly, J., dissenting).

Requiring a substantial nexus to interstate commerce in order to establish the jurisdictional requirement of the federal murder-for-hire statute, as formerly written, is further consistent with the principle of federalism as a meaningful limitation to the jurisdictional reach of federal criminal statutes, which the Court has affirmed in its decisions in *Lopez* and *Morrison*. In *Lopez* and *Morrison*, the Court held that, in order for the federal government to regulate criminal activity based on the Commerce Clause, the activity must

have a substantial relation to interstate commerce. *Lopez*, 514 U.S. at 559-60; *Morrison*, 529 U.S. at 609. The Court recognized that the scope of Congress' power to regulate interstate commerce

> [M]ust be considered in light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectively obliterate the distinction between what is national and what is local and create a completely centralized society.

Lopez at 556-57 (quoting *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)). As this Court recognized in *United States v. Morrison*, there is "no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." 529 U.S. at 617 (emphasis in original); *see also Lopez* 514 U.S. at 584 (Thomas, J., concurring) ("We *always* have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power...."); *Jones*, 529 U.S. at 858 (holding that a restrictive reading of the federal arson statute would avoid the constitutional question that would arise were the statute read to render the "traditionally local criminal conduct" "a matter for federal enforcement").

Lopez and *Morrison* both involved statutes that relied on Congress' power pursuant to the Commerce Clause to regulate non-economic, criminal activities which have a substantial relation to interstate commerce, known as "*Lopez* 2" cases, as opposed to activities which use the channels of interstate commerce ("*Lopez* 1" cases) or the instrumentalities of interstate commerce ("*Lopez* 2" cases). In both *Lopez and*

Morrison, this Court held that there must be a showing that the activities had a "substantial effect" on interstate commerce. *Lopez*, 514 U.S. at 558; *Morrison*, 529 U.S. at 609. The Court in *Lopez* further observed that the statute in question, 18 U.S.C. § 922(q), lacked any jurisdictional element "which might limit its reach to a *discrete set* of firearms possession that additionally have an *explicit* connection or effect on interstate commerce." 514 U.S. at 562 (emphasis added). Despite the Court's recognition that a jurisdictional element might serve to limit the exercise of federal jurisdiction to cases with a substantial or meaningful nexus to interstate commerce, it has been recognized, in the wake of *Lopez*, that jurisdictional elements have not similarly been read to provide similar effective limitations on the exercise of federal jurisdiction in *Lopez* 1 and *Lopez* 2 cases:

> Given the history of lenient judicial interpretation of the channels and instrumentalities prongs and the ease with which a jurisdictional element can be incorporated into a statute, it is reasonable to conclude that the Court may have plugged a hole in the dike of federalism but left the floodgates open.

Diane McGimsey, *The Commerce Clause and Federalism After Lopez and Morrison: The Case for Closing the Jurisdictional-Element Loophole*, 90 Cal. L. Rev. 1675, 1706 (2002).

The Court's requirement in *Lopez* and *Morrison* of a substantial nexus to interstate commerce in *Lopez* 3 cases supports finding that a similar meaningful or substantial connection should also be required in *Lopez* 2 cases. The states' traditional police power over violent crime urges a conclusion that the exercise of federal jurisdiction should not be extended to purely or predominantly *intrastate* crimes.

where instrumentalities of interstate commerce are implicated only in an incidental or inadvertent manner. To hold otherwise would grant federal authorities a virtual plenary police power and disrupt the historic balance of power between the states and the federal government. The principles of federalism reaffirmed by the Court *Lopez* and *Morrison* require some meaningful connection with interstate commerce, as well as some effective limit on the exercise of federal criminal jurisdiction. The jurisdictional element of former § 1958(a) should accordingly not be construed to reach "*intrastate* violence that is *not directed at* the instrumentalities ... involved in interstate commerce," *Morrison*, 529 U.S. at 617 (emphasis added) (citing *Cohens v. Virginia*, 6 Wheat. 264, 426, 428 (1821)). Rather, some meaningful interstate use of a facility should be held to be required, such as a telephone call from a person in one state to a person in another state. *See United States v. Robinson*, 62 F.3d 234, 236-37 (8th Cir. 1995) (recognizing that federal carjacking statute, 18 U.S.C. § 2119, falls under "*Lopez* 2" category and holding that "if the government cannot show that the motor vehicle was transported, shipped, or received in interstate commerce, an element of the carjacking crime has not been proven and the statute will not apply").

The development of technology since the enactment of § 1958 requires further caution in applying an expansive interpretation of the jurisdictional requirement. Advancements in technology have resulted in nearly all forms of communication being "transmitted across state lines regardless of the location of the communicating parties." *Paredes*, 950 F. Supp. at 590. Courts interpreting § 1958 have recognized that today electronic signals from technologies such as the Internet, pagers and cell phones are transmitted through "a complex system of microwave radios, fiber optics, satellites, and cables ... [with an indirect] path ... typically

bear[ing] no relation to state boundaries." *United States v. Stevens*, 842 F.Supp. 96, 98 (S.D.N.Y. 1994) (quoting *Goldberg v. Sweet*, 488 U.S. 252, 255 (1989)). Such technologies are designed to send such signals interstate each time they are activated. *See Weathers*, 169 F.3d at 342 (finding that cellular telephone company "was required to engage in interstate activities by sending a search signal to communications equipment in another state to locate [the defendant's] cellular telephone"); *Stevens*, 842 F.Supp at 98 ("The paging system's very purpose is to reach across state lines to find people. In pursuit of that purpose, it sends radio waves across the borders of three states each time it is activated; every time the system is used, it is used in an interstate manner").

The increasing sophistication of technology presents the risk of unlimited expansion of federal criminal jurisdiction to virtually any murder-for-hire scheme. *See Paredes*, 950 F. Supp. at 589 ("The weakest link in the government's argument is its failure to set reasonable bounds on federal criminal jurisdiction"). It further creates a grave potential for manipulation by federal authorities. *See United States v. Archer*, 486 F.2d 670, 682 (2d Cir. 1973) (reversing Travel Act convictions based on federal jurisdiction manufactured by manipulation of phone call location); *United States v. Coates*, 949 F.2d 104, 105-106 (4th Cir. 1991) (holding "[s]uch 'manufactured jurisdiction' cannot form the basis for a federal prosecution" pursuant to § 1958(a) where defendant approached undercover agents to have his step-brother killed, and agents traveled just across state lines to place a telephone call to the defendant for the purpose of establishing federal jurisdiction). By selectively choosing which cellular phone service it uses, a federal investigative agency can manufacture the requisite minimal interstate nexus, and thereby confer federal jurisdiction over an otherwise purely intrastate

activity. *See* Ryan K. Stumphauzer, *Electronic Impulses, Digital Signals, and Federal Jurisdiction: Congress's Commerce Clause Power in the Twenty-First Century*, 56 Vand. L. Rev. 277 (2003).

Petitioner's case starkly illustrates these risks implicated by an overbroad interpretation of the showing necessary to establish the jurisdictional element to § 1958. Federal agents provided Petitioner with the cell phone number with a Georgia area code. (R14-89, 91.) Petitioner made four calls while physically located within Georgia to an agent who was also physically located in Georgia. (R14-135.) The fact that the signal happened to travel outside Georgia was due to the fact that the cellular service provider happened to use a switching center in Florida to route calls made entirely within a Georgia telephone exchange. (R14-231-35.) More importantly, the interstate transmission of the signals was the direct result of the Government's selection of the cellular service provider. Had the Government selected a different provider, which used a switching center within the State of Georgia, it clearly would not have been able to demonstrate federal jurisdiction in this case.

If the Government is permitted to supply the jurisdictional nexus under § 1958, as it did in Petitioner's case, given the increasing proliferation and interstate operation of modern technologies, practically every murder-for-hire scheme will have the potential for federal prosecution. Indeed, it is nearly impossible to imagine a murder-for-hire offense which would not be federalized. A defendant who makes a call to another person on the same block, or in the same building, within a state, will be subject to prosecution. Such a result would constitute an unwarranted expansion of federal criminal jurisdiction directly contrary to Congress' express intent in

enacting § 1958 and the states' traditional police power over violent crime under principles of federalism.

For these reasons, the Court should resolve the dispute among the Circuits regarding the jurisdictional requirement of former § 1958, and should hold that the actual use of a facility in an interstate manner is required, and that such use of a facility should be significant or meaningful, in the case of a telephone requiring that a phone call be made by a person physically located in one state to another person physically located in another state. Irrespective of the amendment to § 1958(a), the question of the nexus to interstate commerce required to establish the jurisdictional requirement of former § 1958 remains an important issue because many of the of murder-for-hire cases currently awaiting trial and a majority of those cases on direct review, or not yet final, will have been indicted prior to the December 2004 amendment.

CONCLUSION

For the reasons set forth in Issue I, Petitioner respectfully submits that this Court should grant his petition for certiorari and that this Court should remand for resentencing consistent with this Court's opinion in *United States v. Booker*. For the reasons set forth in Issue II, Petitioner respectfully submits that this Court should grant his petition for writ of certiorari to resolve the conflict in the circuits as to the requisite showing as to interstate commerce under the former 18 U.S.C. § 1958.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 02-12924
[Filed September 2, 2003]

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)
v.	)
CARL M. DRURY, JR., M.D., Doctor, Defendant-Appellant.	)

Appeal from the United States District Court for the Southern District of Georgia

Before BARKETT, MARCUS and ALARCON*, Circuit Judges.

OPINION

Dr. Carl M. Drury, Jr. appeals his convictions for using a facility in interstate commerce to effect a murder-for-hire scheme, in violation of 18 U.S.C. § 1958(a), and for

* Honorable Arthur L. Alarcon, United States Circuit Judge for the Ninth Circuit, sitting by designation.

possessing a firearm in connection with a crime of violence, in violation of 18 U.S.C. § 924(c). Drury contends that the government failed to adduce sufficient evidence at trial to establish the jurisdictional element of § 1958(a). In addition, Drury argues that the district court committed reversible error by: 1) instructing the jury that the use of a pay or cellular phone constitutes a *per se* use of a facility in interstate commerce, as that phrase is used in § 1958(a); 2) prohibiting him from introducing evidence of his character for truthfulness; 3) refusing to admit testimony from his son regarding a prior consistent statement that Drury made after his arrest; and 4) denying his requested jury instructions.

We find that the evidence presented at trial sufficiently established the requisite jurisdictional nexus under § 1958(a) and that the district court committed no reversible error. Therefore, we **AFFIRM** Drury's convictions.

I. BACKGROUND

The unusual sequence of events that culminated in Drury's convictions began with Bureau of Alcohol, Tobacco, and Firearms ("ATF") Agent Steven Whatley's separation from his wife. Drury, a longtime friend and family physician, offered to let Whatley reside at his home. Whatley accepted this offer and stayed with Drury for the next several months.

During their time together, Drury complained bitterly about his wife Mary. Drury told Whatley that he needed "some relief" from his wife and joked that "it had to look like an accident." Eventually, Drury asked Whatley if he might be able to find someone to kill his wife. Drury also inquired whether Whatley could modify a pistol to make it fully automatic and "quieter."

Whatley reported this conversation to his supervisor at the Federal Law Enforcement Training Center ("FLETC"), who arranged a meeting with ATF Agents John Limbach and Louis Valoze. The agents provided Whatley with Agent Valoze's undercover cellular phone number and instructed him to give Drury the number upon request. Valoze's cellular phone number was registered in a South Georgia area code. Drury called Agent Valoze's cellular phone from a pay phone, introduced himself as Whatley's friend, and arranged to meet Valoze the next day. This telephone call was recorded. During the call, and all subsequent phone conversations between Agent Valoze and Drury, both men were physically located in Georgia.

As planned, Drury met with Valoze the next day to discuss the murder of Drury's wife. At the meeting, Valoze told Drury that he required a gun and a fee of $2,000. Drury provided Valoze with detailed information regarding his wife, including her place of employment, the type of car she drove, her work schedule, and her habits. He stressed to Valoze that "it just needs to be an accident." At the conclusion of the meeting, Drury informed Valoze that he would call him in a couple of days. Drury did so and provided Valoze with the tag number of his wife's car. He also negotiated Valoze's price for the murder down to $250.

The men met again several days later, and Drury provided Valoze both the $250 and a .38 caliber Taurus handgun. Drury told Valoze that if his wife agreed to sign their divorce papers, the money would only be "to follow her" and see if she was seeing another man. But if Mary refused to sign the papers, "we'll go ahead." The men agreed that Drury would call Valoze at the end of the week with this information.

When Drury called Agent Valoze, he indicated that Mary had not signed the papers, that he should proceed with the plan, and that his wife was staying at her sister's home, so he could "catch her on the way back. It'll be a good, good time." Valoze informed Drury that he would "get it done." Following this conversation, ATF agents arrested Drury.

At trial, the government introduced expert testimony from representatives of BellSouth Telecommunications, the company that serviced the pay telephones Drury used to contact Valoze, and VoiceStream Wireless, the company that serviced Valoze's cellular phone. The BellSouth representative testified that all calls from the phones that Drury used are routed to the Brunswick, Georgia switching center where they are switched to the requested destination, be it local, interstate, or international. The signal from a purely local call would not leave Georgia, but a call to a cellular phone might. The VoiceStream representative testified that Drury's calls to Valoze's cellular phone were all routed out of Georgia to the company's Jacksonville, Florida switching center.

Drury based his defense on the theory that the entire murder-for-hire scheme was, in reality, just an ATF role-playing exercise. He testified at trial that he never spoke with Whatley about killing his wife. Rather, their conversations centered on the possibility that Mary was having an affair. According to Drury, he informed Whatley that he wanted to hire a private investigator to surveil Mary, but could not afford to do so. Whatley had then advised Drury about a role-playing training program at the ATF.[1] Whatley told Drury

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[1] Whatley testified at trial and denied ever discussing or engaging in role-play with Drury. In turn, Drury called two character

that if he entered the program and pretended to seek a murder-for-hire, ATF agents would place Mary under surveillance as part of the exercise. Drury testified that all conversations between himself and Agent Valoze were a product of his belief that they were engaged in role-play. He denied ever actually intending to have Mary killed and stated that he thought the $250 fee was simply reimbursement for the surveillance. As evidence of his belief that the scheme was a role-playing exercise, Drury noted that the purported "trigger" for going ahead with the plan - Mary signing the divorce papers - was, in fact, a falsification; the couple had no plans to divorce. Mary's testimony at trial corroborated the fact that the two had never discussed divorce.

Drury also attempted to introduce testimony from his son, Don, recounting a conversation they had the night Drury was arrested. Don had spoken to Drury immediately following the arrest, while Drury was still in the arresting officer's vehicle, and sought to testify that Drury had told him of the role-playing exercise. The government objected, arguing that the testimony was not admissible because Drury had a motive to fabricate the story after his arrest since he had not informed anyone of the role-playing exercise prior to his arrest. The district court ruled Don's testimony inadmissible.

Drury additionally sought to introduce testimony regarding his character for truthfulness under Rule 608 of the Federal Rules of Evidence. The government responded that Rule 608 did not apply because it had never questioned Drury's character, only his credibility. The district court agreed and excluded the testimony.

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witnesses, Ted Turner and Joseph Bridgers, who testified that Whatley had a reputation for being untruthful.

Prior to trial, Drury had submitted two requested jury charges regarding improper government investigations and witness credibility as follows:

> I instruct you that you may consider such evidence, including improper investigative techniques, in evaluating the credibility of the government witnesses. In other words, an investigation that is thorough and conducted in good faith may lead to more credible evidence than an investigation that is incomplete, negligent, or conducted in bad faith. In deciding the credibility of law enforcement witnesses, you may consider whether the investigation was conducted according to proper protocol and was complete.

I further instruct you that if the government improperly, or inadequately investigated one aspect of this case, you may infer that the government inadequately, or improperly investigated other aspects of the case, as well. Based on this inference alone, you may disbelieve certain government witnesses.

Drury's second proposed jury instruction was 11th Circuit Pattern Jury Instruction (Criminal Cases), Basic Instruction 6.7 at 30 (West 1997):

> There may also be evidence tending to show that a witness has a bad reputation for truthfulness in the community where the witness resides, or has recently resided, or that others have an unfavorable opinion of the truthfulness of the witness. You may consider those matters also in deciding whether to believe or disbelieve such witness.

The district court did not give either instruction. Instead, as part of its preliminary instructions prior to opening statements, the district court instructed the jury that:

> You are the only people who can determine the credibility or the believability of the witnesses. You are the sole judges of the credibility of the witnesses and the weight to be accorded to the testimony and the evidence . . . . What you are going to see is that in determining the credibility of the witnesses you will use the same criteria that you use in your daily life. The same things that you use to determine the credibility or the believability of the witnesses, are exactly the same sorts of things that you use in your daily lives when you are trying to decide whether or not you can believe somebody about a very important matter.

At the close of the trial, the judge provided the following instruction:

In deciding whether you believe or do not believe any witness, I suggest that you ask yourself a few questions: did the witness impress you as one who was telling the truth? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to observe accurately the things he or she testified about? Did the witness appear to understand the questions clearly and answer them directly? Did the witness's testimony differ from other testimony or other evidence?

The district court also informed the jury that, as a matter of law, "pay phones and cellular phones are 'facilities in

interstate commerce' under federal law." Drury objected to this charge and to the district court's refusal to give his requested instructions.

The jury found Drury guilty of both the murder-for-hire scheme and the firearms violation. The district court subsequently sentenced Drury to 204 months' imprisonment. Drury filed a timely appeal with this Court.

II. DISCUSSION

A. The Necessary Interstate Commerce Nexus

Drury first argues that the government failed to adduce sufficient evidence at trial to establish the jurisdictional element of 18 U.S.C. § 1958(a). Specifically, Drury contends that the government did not show that he used a facility in interstate commerce with the intent to commit a murder-for-hire, as required by the statute. Although Drury concedes that each of the calls that he made to Valoze's cellular phone were routed through VoiceStream's Jacksonville, Florida switching center, he nonetheless contends that such contacts are insufficient to satisfy § 1958(a)'s interstate commerce requirement.

The government argues that it was only required to prove that Drury used a means of communication capable of traveling interstate to impose liability under the statute. Alternatively, the government argues that even if the statute requires that a "facility" actually be used in interstate commerce, Drury's call, which was routed through another state, satisfies that requirement. Thus, we are called upon to

interpret and apply 18 U.S.C. § 1958,[2] which provides as follows:

> Use of interstate commerce facilities in the commission of murder-for-hire.
>
> (a) **Whoever** travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or **uses** or causes another (including the intended victim) to use the mail or **any facility in interstate** or foreign **commerce**, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, or who conspires to do so, shall be fined under this title or imprisoned for not more than ten years, or both; and if personal injury results, shall be fined under this title or imprisoned for not more than twenty years, or both; and if death results, shall be punished by death or life imprisonment, or shall be fined not more than $250,000, or both.
>
> (b) **As used in this section** and section 1959-
>
> (1) "anything of pecuniary value" means anything of value in the form of money, a negotiable instrument,

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[2] We note that we are not called upon to decide the constitutionality of this Section, and thus *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995), which discusses the parameters of Congress's power to legislate pursuant to the Commerce Clause, has no relevance here.

a commercial interest, or anything else the primary significance of which is economic advantage;

(2) **"facility of interstate commerce" includes means of transportation and communication**; and

(3) "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

18 U.S.C. § 1958 (emphases supplied).

The statute finds its origins in the Interstate Travel in Aid of Racketeering Statute ("the Travel Act"). See 18 U.S.C. § 1952 (1961), amended by 18 U.S.C. § 1952A (1984). The Travel Act federalized the prosecution of organized crime and racketeering offenses that cross state borders. It originally covered "unlawful activity" associated with organized crime (e.g., gambling, prostitution, liquor, and narcotics), but did not include murder-for-hire as a distinct offense.[3] *See Rewis*

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[3] Section 1952 of the Travel Act, entitled "Interstate and foreign travel or transportation in aid of racketeering enterprises," read as follows:

(a) Whoever travels in interstate or foreign commerce or uses any facility or foreign commerce, including the mail, with intent to-

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity . . .

(b) As used in this section "unlawful activity" means

(1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid,

v. United States, 401 U.S. 808, 811, 91 S. Ct. 1056, 28 L. Ed. 2d 493 (1971) ("Legislative history of the [Travel] Act is limited, but does reveal that § 1952 was aimed primarily at organized crime and, more specifically, at persons who reside in one State while operating or managing illegal activities located in another.").

In 1984, Congress passed the Comprehensive Crime Control Act, which amended the Travel Act to include the crime of murder-for-hire.[4] See 18 U.S.C. § 1952A (1984),

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> narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or
> (2) extortion or bribery in violation of the laws of the State in which committed or of the United States.

18 U.S.C. § 1952 (1961).

[4] The Comprehensive Crime Control Act of 1984 added 18 U.S.C. § 1952A to the Travel Act:

> (a) Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or uses or causes another (including the intended victim) to use the mail or any facility in interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, shall be fined . . . .
> (b) As used in this section and section 1952B
>
> > (1) "anything of pecuniary value" means anything of value in the form of money, a negotiable instrument, a

amended by 18 U.S.C. § 1958 (1988). The interstate nexus requirement set forth in § 1952A closely mirrored the language used in the original version of the Travel Act under § 1952.

In 1988, Congress passed the Anti-Drug Abuse Act of 1988, which, inter alia, recast § 1952A as § 1958. See 18 U.S.C. § 1958 (1988). The text of § 1958 is identical to the previous version under § 1952A, save the addition of the phrase "or who conspires to do so" after the words "pecuniary value."[5]

We begin our analysis with the text of the statute. We must first discern the burden that § 1958(a)'s jurisdictional

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> commercial interest, or anything else the primary significance of which is economic advantage; and
> (2) "facility of interstate commerce" includes means of transportation and communication.

18 U.S.C. § 1952A (1984).

[5] Congress slightly modified the murder-for-hire statute again in 1990, adding a new paragraph, § 1958(b)(3), which explains the usage of the term "State." *See* Crime Control Act of 1990, Pub. L. No. 101-647, § 1205(k), 104 Stat. 4789, 4831 (1990). Subsequent revisions to the statute were minor and did not alter the substantive language of § 1958(a) or § 1958(b). *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § § 600003(a)(ii), 140007(b), 320105, 330016(1)(L), (N), (Q), 108 Stat. 1796, 1969, 2033, 2111, 2147-48 (1994) (increasing the maximum penalty for violations of the statute); Economic Espionage Act of 1996, Pub. L. No. 104-294, § 601(g)(3), 110 Stat. 3488, 3500 (1996) (fixing minor errors in the 1994 amendment).

element imposes upon the government and then judge whether the government met this burden.

1. The Plain Meaning of 18 U.S.C. § 1958

Our analysis begins with an examination of the language of the statute itself. *See RJR Nabisco, Inc. v. United States*, 955 F.2d 1457, 1460 (11th Cir. 1992). We must "determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* at 341. When discerning a statute's plain meaning, courts must endeavor to give effect to all statutory provisions and construe related provisions in harmony with each other. *See Borgner v. Brooks*, 284 F.3d 1204, 1209 (11th Cir.) (citation omitted), *cert. denied sub nom. Borgner v. Florida Bd. of Dentistry*, 537 U.S. 1080, 123 S. Ct. 688, 154 L. Ed. 2d 580 (2002); *Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279, 290, 93 S. Ct. 1614, 36 L. Ed. 2d 251 (1973) ("Different provisions of the same statute normally should be construed consistently with one another.").

Two clauses in § 1958 are central to the instant case. The first, reduced to the relevant text, is "whoever . . . uses . . . any facility in interstate . . . commerce." *See* 18 U.S.C. § 1958(a). The second is "'facility of interstate commerce' includes means of transportation and communication." *See* 18 U.S.C. § 1958(b)(2). While one might expect that the harmonization of two such seemingly manageable clauses would be fairly easy to achieve, there is disagreement in our

sister circuits as to § 1958's proper reach. Compare *United States v. Weathers*, 169 F.3d 336 (6th Cir.) (finding that § 1958 requires that the facility actually be used in interstate commerce), *cert. denied*, 528 U.S. 838, 120 S. Ct. 101, 145 L. Ed. 2d 85 (1999); *United States v. Paredes*, 950 F. Supp. 584, 590 (S.D.N.Y. 1996) (same), *aff'd*, 162 F.3d 1149 (2nd Cir. 1998) (table), *with United States v. Marek*, 238 F.3d 310 (5th Cir.) (finding that using a facility capable of interstate commerce is sufficient), *cert. denied*, 534 U.S. 813, 122 S. Ct. 37, 151 L. Ed. 2d 11 (2001).[6] At least two components of § 1958 contribute to this confusion.

First, it is unclear from the terms of subsection (a) whether the phrase "in interstate . . . commerce,"[7] modifies the spatially proximate noun "facility," *see Marek*, 238 F.3d at 316, or the more remote verb "use." *See id.* at 324-25 (Jolly, J. dissenting). If the former is the case, then " § 1958's use of a 'facility in interstate commerce' is synonymous with the use of an 'interstate commerce facility.'" *See id.* at 313. As such, the focus of subsection (a)'s jurisdictional element would be on the type of facility used, not the manner in which it is used. Conversely, an interpretation focusing on the term "uses" suggests an alternative conclusion. "If the phrase modifies use, then the statute clearly requires that the particular use be 'in interstate or foreign commerce.'" *Id.* at 325 (Jolly, J. dissenting) (emphasis supplied). *See also Paredes*, 950 F. Supp. at 587

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[6] Indeed, this disagreement among the circuits that have addressed this issue highlights that reasonable jurists can differ as to the statute's provision's *proper meaning*, rendering it ambiguous.

[7] An excerpt from the clause "whoever . . . uses . . . any facility in interstate . . . commerce." 18 U.S.C. § 1958(a).

(noting that "there are at least two grammatically cognizable interpretations -- one stressing 'use' and the other stressing 'facility.'").

Second, it is notable that while § 1958(a) utilizes the prepositional phrase "in interstate . . . commerce," § 1958(b) employs the conceptually distinct phrase "of interstate commerce." A plain reading of the phrase "in interstate . . . commerce" would seem to stress the manner in which the facility is used (i.e., a use that actually implicates interstate commerce), whereas a similar evaluation of the phrase "of interstate commerce" implicates the type of facility that is used. This distinction is important. Under the former interpretation, the jurisdictional element of § 1958(a) could only be satisfied if the government proves that the defendant actually used the "facility in interstate commerce." Given the facts in this case, a construction that stresses the manner in which a facility is used would require that the government show that Drury placed a telephone call that actually traveled outside the state of Georgia. In contrast, under the government's view, an interpretation that stresses the type of facility used would dictate only that the means of communication utilized be capable "of interstate commerce." The government, therefore, argues that it is only required to demonstrate that Drury used a telephone to solicit his wife's murder. It is unclear from the distinct prepositional phrases employed in § 1958(a) and § 1958(b) which of these very different definitions conveys the appropriate reach of the statute's jurisdictional nexus.

In short, the structure and language of 18 U.S.C. § 1958 make it impossible to discern a "plain and unambiguous meaning with regard to [§ 1958]." Robinson, 519 U.S. at 340; see also Paredes, 950 F. Supp. at 587 ("The phrase 'use . . . any facility in interstate or foreign commerce' is

inherently ambiguous."). As a consequence, we must resort to alternative canons of statutory interpretation. *See United States v. Monsanto*, 491 U.S. 600, 611, 109 S. Ct. 2657, 105 L. Ed. 2d 512 (1989).

2. *All Words Must, To The Extent Possible, Be Given Meaning*

"A basic premise of statutory construction is that a statute is to be interpreted so that no words shall be discarded as being meaningless, redundant, or mere surplusage." *United States v. Canals-Jimenez*, 943 F.2d 1284, 1287 (11th Cir. 1991). "It is our duty 'to give effect, if possible, to every clause and word of a statute.'" *United States v. Menasche*, 348 U.S. 528, 538-539, 75 S. Ct. 513, 99 L. Ed. 615 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152, 2 S. Ct. 391, 27 L. Ed. 431 (1883)). Avoiding circumscription in our reading of the murder-for-hire statute requires that the two clauses at issue here be harmonized so that neither is rendered meaningless.

The government argues that the phrase "facility of interstate commerce" in § 1958(b)(2) simply defines the phrase "facility in interstate . . . commerce" in § 1958(a). This tactic assumes that Congress intended for the words "in" and "of" to be used interchangeably. But this deceptively simple construction is inherently problematic. Despite the convenience of equating the word "in" with the word "of," it is clear that the two terms are different. As a consequence, this approach runs counter to the very principle that it seeks to effect by "discarding as being meaningless, redundant, or

mere surplusage" § 1958(a)'s use of the word "in."[8] *Canals-Jimenez*, 943 F.2d at 1287. Moreover, it distorts the meaning of the word "uses" in the phrase: "Whoever . . . *uses* . . . any facility in interstate . . . commerce."

To avoid the shortcomings of equating two plainly different terms, we read § 1958(b)(2) in harmony with § 1958(a). An accord between the two subsections is achieved by recognizing that § 1958(b) merely provides examples of what might constitute a "facility" under the statute. This makes sense because § 1958(b)(2) does not even purport to be definitional, but rather explicitly uses language making it exemplary. *See* 18 U.S.C. § 1958(b). Unlike other statutes that clearly designate a definitions section, § 1958 simply states that, "as used in this section . . . 'facility of interstate commerce' includes means of transportation and communication." *Id.* (emphasis supplied). Because it is not intuitive that a "*facility* of interstate commerce" would include things such as a telephone or a passenger car, this provision does not "accomplish[] absolutely nothing," as the concurrence claims, but rather includes telephones in the types of "facilities *of* interstate commerce" that must be used in interstate commerce to satisfy § 1958(a). Read in this way, § 1958(b) does not conflict with § 1958(a), as it neither equates two different terms nor defines a phrase not present in subsection (a). *Id.* Thus, a faithful application of the dual

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[8] If we were to accept the proposition that different terms in a statute may be used interchangeably, then an equally plausible interpretation of the statute would be that § 1958(b)(2) meant to employ the phrase "facility in interstate commerce." Based on this view, § 1958(b)(2) simply provides examples of the modalities of interstate commerce that can satisfy § 1958(a) if they are used "in interstate commerce." *See* 18 U.S.C. § 1958(a).

principles that (1) a statute should not be read in a manner that renders its terms "mere surplusage" and (2) courts should try to harmonize distinct provisions in a statute lends support to the conclusion that § 1958 applies solely to facilities that are actually used in interstate commerce.[9] Other interpretive guides counsel the same result.

3. Clear Statement Rule

Particularly relevant to the instant case is the precept that "if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989) (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242, 105 S. Ct. 3142, 87 L. Ed. 2d 171 (1985)). "The clear statement rule . . . ensure[s] that attempts to limit state power [are] unmistakable, thereby structuring the legislative process to allow the centrifugal forces in Congress the greatest opportunity to protect the states' interests." *Hutto v. Finney*, 437 U.S. 678, 706 n.4, 98 S. Ct. 2565, 57 L. Ed. 2d 522 (1978) (Powell, J. concurring in part and dissenting in part) (quoting Laurence H. Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 Harv. L. Rev. 682, 695 (1976)). To apply the clear statement rule, we must first determine whether § 1958 generates federalism concerns

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[9] We therefore find ourselves in agreement with Judge Jolly's analysis in *Maxey*, 238 F.3d at 324 (Jolly, J. dissenting), and with those cases holding that the facility's actual use must be interstate. *See Weathers*, 169 F.3d at 339; *Paredes*, 950 F. Supp. at 590.

and, if so, assess whether Congress made its intention to alter the federal-state balance clear in the text of the statute.

We find that § 1958 impinges upon the traditional powers of the states. As the Supreme Court has stated, "when Congress criminalizes conduct already denounced as criminal by the States, it effects 'a change in the sensitive relation between federal and state criminal jurisdiction.'" *United States v. Lopez*, 514 U.S. 549, 561 n.3, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995) (quoting *United States v. Enmons*, 410 U.S. 396, 411-412, 93 S. Ct. 1007, 35 L. Ed. 2d 379 (1973)) Murder, whether by one's own hand or for hire, is a quintessential example of a crime traditionally considered within the States' fundamental police powers. Accordingly, § 1958's federalization of murder-for-hire crimes necessarily engenders a shift in the federal-state balance.[10] *See id.*

In enacting § 1958, however, Congress failed to use "unmistakably clear" language that would signal its intent to alter this balance. Instead, as discussed *supra* Part I(A)(1), the statute is ambiguous with regard to its jurisdictional nexus requirement. In the absence of a clear statement of congressional design, the Supreme Court has refused to

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[10] Contrary to the concurrence's reasoning on this point, the clear statement rule is not applied only in cases where Congress has totally "deprived" the states of an area of traditional state legislative control. Rather, the rule applies more broadly, such as when Congress "alter[s]," *Will*, 491 U.S. at 65, "upset[s]," *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 208, 112 S. Ct. 560, 116 L. Ed. 2d 560 (1991) (O'Connor, dissenting), or "significantly change[s] the federal-state balance," *United States v. Bass*, 404 U.S. 336, 349, 92 S. Ct. 515, 30 L. Ed. 2d 488 (1971), as it has done here in enacting § 1958.

interpret ambiguous federal statutes in a manner that disrupts the delicate balance between state and federal power. *Gregory v. Ashcroft*, 501 U.S. 452, 460-464, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991). Rather, the Court has instructed that when faced with two plausible interpretations of an ambiguous federal criminal statute, courts should generally apply the alternative that does not impute an intention upon Congress to invoke its full commerce power to regulate conduct traditionally controlled by the States. *See Enmons*, 410 U.S. at 411-412; *United States v. Bass*, 404 U.S. 336, 349-350, 92 S. Ct. 515, 30 L. Ed. 2d 488 (1971); *Rewis*, 401 U.S. at 812. Given the ambiguity in § 1958, the plain statement rule directs us to construe the statute in a manner that minimizes the federal intrusion on state police powers.[11] *See Bass*, 404 U.S. at 350. This aim is accomplished through a narrow interpretation of § 1958's jurisdictional element to require that the facility in question must actually be used in interstate commerce.[12] *See id.*

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[11] This maxim is particularly applicable here, where a broad reading of § 1958(a) would federalize virtually every murder-for-hire scheme. Indeed, it is highly improbable that any murder-for-hire could be set in motion without the participants availing themselves of at least one "facility of interstate commerce" (e.g., land and cellular phones, walkie-talkies, automobiles, or the like) even though they may have traveled no further than next door within the state's borders. As discussed infra Part II(A)(5), the drafters of the Travel Act were acutely sensitive to this possibility and intended to guard against it.

[12] In contrast, "allowing the government to meet the interstate commerce requirement through only a nominal showing of a connection to interstate commerce would do as much to 'completely obliterate' the distinction between national and local authority as if no jurisdictional requirement existed at all." *United States v. Odom*, 252 F.3d 1289, 1296 (11th Cir. 2001), *cert. denied*, 535 U.S.

4. The Rule Of Lenity

The rule of lenity is also applicable to our inquiry into the intended scope of § 1958's jurisdictional element. It states that "when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *McNally v. United States*, 483 U.S. 350, 359-360, 107 S. Ct. 2875, 97 L. Ed. 2d 292 (1987); *see also Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393, 123 S. Ct. 1057, 1068, 154 L. Ed. 2d 991 (2003) (applying the rule of lenity to the Hobbs Act). Two vital functions are served by the rule:

> First, 'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.' Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity.

Bass, 404 U.S. at 348 (internal quotation, citations, and a footnote omitted). Given ambiguity in a criminal statute, the rule of lenity counsels us to construe it more narrowly. *Id.* at 347; *see also Rewis*, 401 U.S. at 812 ("In short, neither statutory language nor legislative history supports such a broad-ranging interpretation of [the Travel Act]. And even if this lack of support were less apparent, ambiguity concerning

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1058, 122 S. Ct. 1920, 152 L. Ed. 2d 828 (2002).

the ambit of criminal statutes should be resolved in favor of lenity.") (citing *Bell v. United States*, 349 U.S. 81, 83, 75 S. Ct. 620, 99 L. Ed. 905 (1955)). Applied to § 1958, this rule instructs that § 1958(a)'s jurisdictional element should be interpreted to include only the use of facilities that are actually engaged in interstate commerce.

5. Legislative History

Finally, although we do not find it necessary to rely on legislative history to resolve the question before us, a review of § 1958's legislative history persuades us that the aforementioned interpretive guides lead to the correct conclusion. As stated previously, the modern federal murder-for-hire statute derives from the Travel Act. *See* 18 U.S.C. § 1952 (1961). The Travel Act originated in a bill forwarded to Congress by Attorney General Robert F. Kennedy on April 6, 1961. Letter from Robert F. Kennedy, Attorney General, to the Vice President (Apr. 6, 1961), S. Rep. No. 87-644, at 4 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2664, 2666 ("Attorney General Letter of 1961"); *see also United States v. Archer*, 486 F.2d 670, 685 (2d Cir. 1973). This letter proposed a statute of limited scope aimed at combating organized crime and racketeering:

> Because many rackets are conducted by highly organized syndicates whose influence extends over State and National borders, the Federal Government should come to the aid of local law enforcement authorities in an effort to stem such activity.

Attorney General Letter of 1961 at 4. Attorney General Kennedy made clear that the proposed bill was intended to combat organized crimes that cross state or national borders:

> The bill which I submit to the Congress would impose criminal sanctions upon the person whose work takes him across State or National boundaries in aid of certain "unlawful activities."

Id. Thus, an interstate nexus was central to the proposed legislation and justified the federalization of the subject crimes. *See also United States v. Nardello*, 393 U.S. 286, 290, 89 S. Ct. 534, 21 L. Ed. 2d 487 (1969) (quoting Kennedy's statement to the Committee that the Act would assist prosecution where "the 'top men' of a given criminal operation resided in one State but conducted their illegal activities in another").

Beyond Attorney General Kennedy's letter and testimony before Congress regarding the foundational Travel Act, the main substantive historical source for the current murder-for-hire statute is found in a 1984 Senate Subcommittee Report on the Comprehensive Crime Control Act of 1984.[13] *See* S. Rep. No. 98-22 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3484. This report contains language conveying the intended scope of the statute's jurisdictional element.

For example, the report states that the drafters sought "to ensure that the new murder-for-hire statute [would be] used in appropriate cases to assist the states rather than to allow the usurpation of significant cases by federal authorities that could be handled as well or better at the local level." 1984 U.S.C.C.A.N. at 3484; *see also Paredes*, 950 F. Supp. at

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[13] As noted in Part II(A), supra, the Comprehensive Crime Control Act amended the Travel Act and added the murder-for-hire provision.

588 ("This brief quotation from the legislative history confirms that even before the mushrooming of interstate communication technology such as beepers, cellular phones and email, Congress was concerned that the murder-for-hire statute would allow federal 'usurpation' of essentially local cases."). In this regard, "the committee [noted its] awareness of the concerns of local prosecutors with respect to the creation of concurrent federal jurisdiction in an area, namely murder cases, which has heretofore been the almost exclusive responsibility of state and local authorities." 1984 U.S.C.C.A.N. at 3484. As the report explicitly states, "the committee fully appreciated that many state and local police forces and prosecutor offices are quite capable of handling a murder-for-hire case notwithstanding the presence of some interstate aspects." *Id.* Thus, while the report notes that the proposed statute allows that "the option of federal investigation and prosecution should be available when a murder is committed or planned as consideration for something of pecuniary value and the proper federal nexus . . . is present," *id.*, this "does not mean, nor does the committee intend, that all or even most such offenses should become matters of federal responsibility." *Id.* Rather, to the extent that federal jurisdiction is sought over crimes with an interstate component, it "should be asserted selectively based on such factors as the type of defendants reasonably believed to be involved" and "the relative ability of the federal and state authorities to investigate and prosecute." *Id.* (emphasis supplied). These passages from the Senate Subcommittee report indicate that the drafters intended § 1958(a)'s jurisdictional element to require at least some "interstate aspects" beyond the mere intrastate use of a car, telephone, or other facility capable of interstate commerce.

Further support for a narrow reading of the murder-for-hire statute is found in the examples that the report provides of the requisite jurisdictional nexus. The report states that:

> an interstate telephone call is sufficient to trigger federal jurisdiction, as it is under the [International Traffic in Arms Regulations, 22 C.F.R. §§ 120.1-130.17 (1990)] statute. Both the person who ordered the murder and the 'hit man' would be covered by the new section provided the interstate commerce or mail nexus is present.

Id. (emphasis supplied). This passage makes plain that the Subcommittee contemplated federal jurisdiction only over cases where the participants used facilities in the course of interstate commerce. Indeed, it would make little sense for the Subcommittee expressly to indicate that an "interstate telephone call is sufficient to trigger federal jurisdiction" if it intended that all phone calls - regardless of origin or destination (i.e., even intrastate calls) - could achieve this end.[14] *Id.*

In sum, the report demonstrates that the Senate Subcommittee did not intend to federalize murder-for-hire schemes with merely tenuous links to interstate commerce. Instead, only "crimes with interstate features" were to be

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[14] This disjoint between the legislative history and an expansive interpretation of § 1958(a)'s jurisdictional element was noted by the dissenters in *Marek*, who observed, "the report does not assert that any use of a telephone is sufficient. Instead, it suggests that the actual use must be in interstate or foreign commerce." *Marek*, 238 F.3d at 327 (Jolly, J. dissenting).

prosecuted federally. *Id.* The very notion "that a defendant who never travelled from one state to another, conducted an interstate transaction, or communicated across state lines could now be prosecuted under this Act because of the evolution in communications technology runs against the grain of the statute's legislative history." *Paredes*, 950 F. Supp. at 588; *see also Archer*, 486 F.2d at 685 ("Both the legislative history summarized in our opinion and the additional extracts relied on in the Government's petition show that the overriding Congressional purpose was to permit the federal government to act against members of organized crime whose activity crossed state lines when local law enforcement officers were unable or unwilling to do so . . . ."). Accordingly, we conclude that the legislative history strongly suggests that Congress intended § 1958(a)'s interstate nexus provision to be read narrowly rather than broadly; that is, the facility in question must actually be used in an interstate manner rather than simply be capable of such use.

6. Conclusion Regarding Section 1958(a)'s Jurisdictional Element

Based on the foregoing, we conclude that 18 U.S.C. § 1958(a)'s jurisdictional element requires that a defendant must actually use a facility in a manner that implicates interstate commerce, not just that the facility itself possess the capability of affecting interstate commerce. With that issue decided, we now turn to the question of whether the government presented sufficient evidence at trial to demonstrate that Drury's telephone calls actually moved in interstate commerce.

B. Sufficiency of the Evidence

Whether there is sufficient evidence to support a conviction is a question of law which this Court reviews de

novo. *United States v. Tarkoff*, 242 F.3d 991, 993 (11th Cir. 2001). The relevant inquiry is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (*quoting Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 319, 61 L. Ed. 2d 560 (1979)). "All reasonable inferences and credibility choices [are] made in the government's favor." *United States v. Miles*, 290 F.3d 1341, 1355 (11th Cir.), *cert. denied*, 537 U.S. 1089, 123 S. Ct. 707, 154 L. Ed. 2d 634 (2002).

To support a murder-for-hire conviction under § 1958(a), the government must show that the defendant either (1) traveled (or caused another to travel) in interstate commerce or (2) used the mail, or used any facility of interstate commerce in a manner that qualifies as interstate commerce. See 18 U.S.C. § 1958(a). Here, there is no question that Drury did not travel in interstate commerce or use the mail "with the intent that a murder be committed." *Id.* Therefore, the jury's verdict will only stand if the government proved beyond a reasonable doubt that any of the telephone calls that Drury made to Valoze's cellular phone ventured outside the state of Georgia.

We conclude that the government adequately satisfied its evidentiary burden. Drury does not dispute the government's expert testimony that the telephone calls to Valoze's cellular phone traveled through a switching center in Jacksonville, Florida before reaching their final destination.[15] Instead,

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[15] Drury does, however, mistakenly refer to the signal as a radio signal. This is incorrect. Prior to reaching the cellular tower closest to the target-user's cellular phone, a telephone signal sent from a

Drury simply contends that a "signal sent unintentionally and inadvertently across state lines" is too "tenuous and insufficient" a contact for "the government to satisfy the jurisdictional element of § 1958." This argument is unavailing.

We have already determined that § 1958(a)'s jurisdictional element solely implicates the use of facilities that actually cross state lines. *See supra* Part II(A). Thus, the statute regulates a "channel of interstate commerce," and Congress's authority to do so is quite clear. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964) ("The authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.") (*quoting Caminetti v. United States*, 242 U.S. 470, 491, 37 S. Ct. 192, 61 L. Ed. 442 (1917)). Accordingly, it is of no moment that Drury's telephone calls to Valoze only incidentally and unintentionally ventured out of state. The undisputed fact is that they did. We, therefore, conclude that the government satisfied its evidentiary burden under § 1958(a).

Circuit precedent supports this conclusion. In *United States v. Davila*, 592 F.2d 1261 (5th Cir. 1979),[16] we held

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land-line travels entirely through terrestrial means. It is only after that call has been switched by the cellular provider to the cellular tower closest to the target subscriber that the signal passes via radio signals.

[16] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions handed down prior to the close of business on September 30, 1981.

that even minimal interstate contacts are sufficient to satisfy the federal wire fraud statute's jurisdictional element. *See* 18 U.S.C. § 1343. Despite the tenuous nature of the interstate contact in *Davila*, essentially a "purely incidental" routing of a Western Union wire transfer through the state of Virginia, we upheld the defendant's conviction. *See id.* We reasoned that, since the wire transfers could not have been consummated without the interstate contacts, the interstate nexus was not "too minimal and incidental to satisfy jurisdictional demands . . .; they were essential, and they went of necessity on interstate facilities." *Davila*, 592 F.2d at 1264.

The routing of Drury's telephone calls through the Jacksonville switching center was similarly "essential" to their completion. Though the contacts themselves were certainly minimal, the government presented sufficient evidence at trial of their interstate nature for a jury to have "found the essential elements of the crime beyond a reasonable doubt." *Tarkoff*, 242 F.3d at 993. We, therefore, reject Drury's sufficiency of the evidence claim.

C. The "In Interstate Commerce" Jury Charge

Drury next argues that, regardless of whether the evidence presented at trial might have been sufficient to establish the jurisdictional nexus, the district court erred by instructing the jury that "pay telephones and cellular telephones are 'facilities in interstate commerce' under federal law." Such an instruction, Drury maintains, removes from the jury's consideration an essential element of a § 1958(a) violation: the interstate nexus. Citing the Supreme Court's decision in *United States v. Gaudin*, 515 U.S. 506, 510, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995), Drury asserts that the district court's instruction violated his right to have the jury decide

whether he "is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *Id.* (citation omitted).

The propriety of the trial court's instructions to the jury regarding § 1958(a)'s jurisdictional element is an issue of law which we review *de novo*. *See United States v. Leonard*, 138 F.3d 906, 908 (11th Cir. 1998).

Section 1958(a)'s interstate nexus requirement is an essential element of a murder-for-hire offense. *See United States v. Tinoco*, 304 F.3d 1088, 1105 (11th Cir. 2002) ("The use of interstate facilities is a substantive element of Travel Act offenses that must be decided by the jury.") (*citing United States v. Perrin*, 580 F.2d 730, 737 (5th Cir. 1978)), *cert. denied sub nom. Hernandez v. United States*, 538 U.S. 909, 123 S. Ct. 1484, 155 L. Ed. 2d 231 (2003). "The Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged." *Gaudin*, 515 U.S. at 522-23. As a consequence, Drury was entitled to have the jury determine whether § 1958(a)'s jurisdictional element was satisfied. *Id.* at 513 (noting that there is a "historical and constitutionally guaranteed right of criminal defendants to demand that the jury decide guilt or innocence on every issue, which includes application of the law to the facts").

We have already determined that the phrase "facility in interstate . . . commerce" is not the functional equivalent to "facility of interstate commerce." *See supra*, Part II(A)(2). Whereas the latter phrase includes all facilities that are capable of effecting interstate communication, the former phrase requires that the facility actually be used in a manner that traverses state boundaries. By instructing the jury that the use of a pay or cellular phone is *per se* interstate commerce

under § 1958(a), the district court both removed an element of the crime from the jury's consideration and did so by way of a faulty definition.[17] Thus, the district court's instructions to the jury constituted an erroneous statement of the law.

But this conclusion does not end our inquiry. In addition to finding error, we must determine whether that error provides grounds for a reversal. *Chapman v. California*, 386 U.S. 18, 22, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) ("We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction."). A jury instruction which omits an element of the charged offense is subject to harmless error analysis. *See Neder v. United States*, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) ("An instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for

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[17] The government cites our decision in *United States v. Castleberry*, 116 F.3d 1384, 1389 (11th Cir. 1997), in support of its contention that the district court's instruction was proper. But in that case the district court defined the phrase "interstate commerce," not "facility in interstate commerce." Moreover, the *Castleberry* court merely stated that "if you believe beyond a reasonable doubt that the defendant committed extortion . . . and you believe that the Government's evidence regarding the impact on interstate commerce beyond a reasonable doubt, then, as a matter of law, the jurisdictional requirements of the Hobbs Act . . . have been met." *Id.* This instruction, which does not state that the defendant's conduct constitutes, *per se*, interstate commerce, properly left it to the jury to determine whether the interstate nexus had been proven beyond a reasonable doubt.

determining guilt or innocence."); *Ross v. United States*, 289 F.3d 677, 681 (11th Cir. 2002), *cert. denied*, 537 U.S. 1113, 123 S. Ct. 944, 154 L. Ed. 2d 787 (2003). The appropriate harmless error test in this context is "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Neder*, 527 U.S. at 15.

Here, the district court's jurisdictional element instruction was harmless. At trial, the government presented evidence that the telephone calls between Drury and Valoze traveled from Georgia to Florida and then back to Georgia. Drury neither offered testimony to counter this evidence nor disputed its veracity on appeal. Given that the factual foundation for the § 1958(a) jurisdictional nexus is uncontested, we cannot conclude that Drury's substantial rights were impugned by the district court's erroneous statement of the law. *See id.* We have no reasonable doubt that, had the jury been properly instructed, it would have reached the same result. Neder, 527 U.S. at 15. Although the district court erred in instructing the jury that telephones are per se "facilities in interstate commerce," we conclude that this error was harmless.

D. Truthful Person Evidence Under Fed. R. Evid. 608(a)(2)

Drury next challenges the district court's decision to exclude evidence that he is a truthful person. Drury contends that the government affirmatively challenged his believability.[18] As such, Drury argues that the district court

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[18] Drury also contends that the government evidenced its intent to attack his character during a sidebar meeting with the trial judge.

abused its discretion by barring rehabilitative evidence under the "otherwise attacked" provision in Rule 608(a)(2) of the Federal Rules of Evidence.[19]

This Court reviews a district court's evidentiary rulings for "a clear abuse of discretion." *Tinoco*, 304 F.3d at 1119 (citation omitted). A district court's evidentiary rulings will only be reversed if the resulting error "affected the defendant's substantial rights." *Id.* (*citing United States v. Hands*, 184 F.3d 1322, 1329 (11th Cir. 1999)). "The trial judge is given broad discretion in ruling on the admissibility of character testimony." *United States v. Solomon*, 686 F.2d 863, 874 (11th Cir. 1982).

After a careful review of the pertinent exchanges between the government's counsel and Drury, we conclude that the district court did not abuse its discretion in excluding the proffered testimony. In general, "the credibility of a witness

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In that conversation, the government's attorney stated that "this is not a collateral material [sic], he has made character an issue in his defense." But either mistakenly or with intent, Drury takes this statement entirely out of context. In reality, that quoted statement referred not to Drury's "character for truthfulness," but to the "character of the relationship" between himself and Whatley, as is shown by a statement made by the prosecutor a few seconds earlier: "this defendant has made it a linchpin of his defense that his relationship with Mr. Whatley was of a particular character." Therefore, we decline to address this purported error.

[19] Rule 608(a)(2) states that "evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise." Fed. R. Evid. 608(a)(2) (emphasis supplied).

may be attacked or supported by evidence in the form of opinion or reputation, but evidence of a witnesses' [sic] truthful character is admissible only after character for truthfulness has been attacked." *United States v. Hilton*, 772 F.2d 783, 786 (11th Cir. 1985) (citing Fed. R. Evid. 608(a)) (emphases supplied). An "attack" that consists of "Government counsel pointing out inconsistencies in testimony and arguing that the accused's testimony is not credible does not constitute an attack on the accused's reputation for truthfulness within the meaning of Rule 608." *United States v. Danehy*, 680 F.2d 1311, 1314 (11th Cir. 1982). This is precisely what occurred during the government's cross-examination of Drury and, therefore, the district court did not abuse its discretion in excluding the desired reputation for truthfulness testimony.

E. Prior Consistent Statements Under Fed. R. Evid. 801(d)(1)(B)

Drury advances two arguments in support of his assertion that the district court abused its discretion in refusing to allow his son Don to testify regarding a statement Drury made subsequent to his arrest. First, he contends that the statement was admissible under Rule 613(b) of the Federal Rules of Evidence as a prior consistent statement that "may be used for rehabilitation when the statement has a probative force bearing on credibility beyond merely showing repetition." *See United States v. Pierre*, 781 F.2d 329, 333 (2d Cir. 1986). Drury claims that Don's testimony would have rebutted the government's charge that he fabricated the role-playing story and is probative of his credibility on this issue. Second, Drury argues that under Fed. R. Evid. 801(d)(1)(B), his statements to his son should have been admitted because they were made before he had the motive or opportunity to fabricate a story. See Fed. R. Evid. 801(d)(1)(B). Drury avers that the district

court abused its discretion by simply applying a "temporal litmus test," determining that since the statements were made after the arrest Drury possessed a motive to fabricate and the statements were not admissible. *See United States v. Prieto*, 232 F.3d 816, 822 (11th Cir. 2000) (rejecting a "bright line rule that motive to fabricate necessarily and automatically attaches upon arrest").

"A district court is granted broad discretion in determining the admissibility of a prior consistent statement under Fed. R. Evid. 801(d)(1)(B) and will not be reversed absent a clear showing of abuse of discretion." *Id.* at 819 (*citing United States v. Reed*, 887 F.2d 1398, 1405 (11th Cir. 1989)).

The district court did not abuse its discretion in denying Drury's request to admit his son's testimony regarding the alleged prior statements. First, contrary to Drury's assertions, Rule 613(b) is inapplicable to the facts of this case. That rule is pertinent only where a party seeks to introduce "extrinsic evidence of a prior inconsistent statement by a witness . . . ." Fed. R. Evid. 613(b). Drury's proffered statement was not "a prior inconsistent statement"; rather, it was consistent and, therefore, Rule 613(b) does not apply. Second, Drury's reliance upon Rule 801(d)(1)(B)[20] and Prieto for the

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[20] Rule 801(d)(1)(B) states:

> A statement is not hearsay if . . . the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive."

proposition that the district court abused its discretion by applying a "temporal litmus test" to the proffered statements is also misplaced. It is true that in *Prieto*, 232 F.3d at 820, we declined to adopt a "bright line, per se rule [under Fed. R. Evid. 801(d)(1)(B)] barring the admission of any prior consistent statements made by a witness following arrest." But we also stated that "whether a witness had a motive to fabricate when [the] prior consistent statements were made is plainly a question of fact to be resolved by the trial court based precisely on the particular circumstances of an individual case." *Id.* at 821. Here, after reviewing the proffered statement, the district court concluded that "in my view, the conditions established by this case of the admissibility of such a statement have not been established here." While a more detailed set of findings on this topic would have eased our inquiry, the record provides ample support for the district court's determination that Drury, subsequent to his arrest, had adequate motive and opportunity to fabricate the story that he allegedly told his son. *See id.* at 821. Accordingly, we conclude that the district court did not clearly abuse its discretion in this regard.

F. Refused Jury Instructions

Lastly, Drury urges this Court to find error in the district court's refusal to give two requested jury instructions. The first proposed instruction, quoted in full *supra* Part I, addresses improper investigative techniques and the credibility inferences that jurors may draw from them regarding the testimony of government witnesses. Drury contends that the district court's credibility instructions were insufficient due to

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Fed. R. Evid. 801(d)(1)(B).

over-breadth and severely hindered his defense. The second instruction that Drury proposed is 11th Circuit Pattern Jury Instruction 6.7, also quoted in full *supra* Part I, which concerns a witness's reputation for truthfulness in the community. Drury argues that the district court abused its discretion in declining to provide this instruction because Whatley, whom Drury characterizes as the crux of the government's case, was shown at trial to have a bad reputation for truthfulness in the community.

"This Court reviews a district court's refusal to give a proposed jury instruction for an abuse of discretion." *United States v. Futrell*, 209 F.3d 1286, 1288 (11th Cir. 2000). "The district court's refusal to give the requested instruction is reversible error only if (1) the instruction is substantially correct, (2) the instruction was not addressed in the charge actually given, and (3) the failure to give the requested instruction seriously impaired the defendant's ability to present an effective defense." *United States v. De La Mata*, 266 F.3d 1275, 1298 (11th Cir. 2001).

We find no error in the district court's decision not to give Drury's requested instructions. Drury's suggested non-pattern charge was superfluous, as the instruction that the district court did provide adequately addressed the issue of witness credibility. The "district court has broad discretion in formulating its charge as long as the charge accurately reflects the law and the facts." *United States v. Gold*, 743 F.2d 800, 819 (11th Cir. 1984). Because the charge given adequately presented the law and the facts regarding witness credibility, we conclude that the district court did not abuse its discretion by refusing to give Drury's proposed instruction. *See United States v. Fulford*, 267 F.3d 1241, 1246 (11th Cir. 2001).

Nor did the district court abuse its discretion by declining to give 11th Circuit Pattern Jury Instruction 6.7. Clearly, this charge is "substantially correct" and, thus, satisfies the first prong of the jury instruction analysis. *United States v. Roberts*, 308 F.3d 1147, 1153 (11th Cir. 2002), *cert. denied*, 123 S. Ct. 2232, 155 L. Ed. 2d 1119 (2003). With regard to the second prong, we agree that it is a close question whether the charge provided by the district court adequately covers the same territory as the pattern instruction proffered by Drury. We admit some level of concern because, while the requested instruction refers to a witness's "*reputation* for truthfulness in the community," *see* 11th Cir. Pattern J. Instr. 6.7 (emphasis added), the charge given concerns solely the believability and truthfulness of a witness. However, even assuming arguendo that the proposed pattern instruction was not sufficiently addressed in the charge actually given by the district court, see Roberts, 308 F.3d at 1153, we nonetheless conclude that Drury's assignment of error must fail under the third prong of the analysis. See id. Specifically, Drury has not shown that "the [district court's] failure to give the [requested] instruction substantially impaired [his] ability to present an effective defense." *Id.*

We perceive no impediment to Drury's effective defense in this particular case. This conclusion is bolstered by the fact that the district court permitted Drury to argue vigorously to the jury that Whatley possessed a bad reputation for truthfulness through (1) the testimony of two character witnesses, (2) a cross-examination of Whatley, and (3) the defense's closing arguments. *See United States v. Ryan*, 289 F.3d 1339, 1345 (11th Cir.), *cert. denied*, 537 U.S. 927, 123 S. Ct. 324, 154 L. Ed. 2d 221 (2002); *see also United States v. Chirinos*, 112 F.3d 1089, 1101 (11th Cir. 1997) (finding that the district court's failure to instruct did not impair the defendant's ability to defend where the court permitted

defendant to elicit supporting testimony and to make closing arguments on the issue). Coupled with the arguably satisfactory truthfulness instruction that the district court did provide, we conclude that the court did not abuse its discretion by refusing Drury's proposed pattern jury instruction.

III. CONCLUSION

Based on the foregoing, we **AFFIRM** Drury's murder-for-hire convictions under 18 U.S.C. § 1958(a). We also **AFFIRM** Drury's conviction under 18 U.S.C. § 924(c).

MARCUS, J., Circuit Judge concurring specially:

I agree with the majority that appellant Carl M. Drury's convictions should be affirmed, and accordingly I join in the result reached by my colleagues. I also agree that none of the district court's evidentiary rulings challenged by Drury constituted an abuse of discretion, and I join in sections D and E of the majority opinion. Moreover, the majority correctly concludes that the district court did not err in refusing to charge the jury as requested by appellant, and accordingly I join section F of its opinion as well.

However, I strongly disagree with the majority's conclusion that 18 U.S.C. § 1958's jurisdictional element can be satisfied only by a showing that the action taken in furtherance of a murder-for-hire scheme involved the actual crossing of state lines. Instead, I have little doubt that the purely intrastate use of *an instrumentality of interstate commerce* is sufficient to confer jurisdiction under § 1958. As such, I am unable to join in section A of the majority

opinion.[1] As a corollary, I also respectfully disagree with the majority's determination in section C of its opinion that the district court erred under *United States v. Gaudin*, 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995), by instructing the jury that a telephone is *per se* a facility in interstate commerce.

In *United States v. Lopez*, the Supreme Court reaffirmed that there are "three broad categories of activity that Congress may regulate under its commerce power." 514 U.S. 549, 558, 115 S. Ct. 1624, 1629, 131 L. Ed. 2d 626 (1995). "First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, *even though the threat may come only from intrastate activities*. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce[,] *i.e.*, those activities that substantially affect interstate commerce." *Id.* at 558-59, 115 S. Ct. at 1629-30 (citations omitted) (emphasis added). Of particular interest in this case is the second type of regulation that may legitimately be undertaken pursuant to the commerce power, *the regulation of the instrumentalities of interstate commerce*.

There can be little doubt that where Congress chooses to exercise the full extent of its commerce power it can proscribe

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[1] I agree with my colleagues that the actual interstate use of a facility, e.g., the crossing of a cellular telephone signal from Georgia to Florida and back, plainly confers jurisdiction under § 1958(a). However, because I believe that such actual interstate movement is unnecessary to satisfy this section's jurisdictional requirement, I do not join section B of the majority opinion.

the purely intrastate use of an instrumentality of interstate commerce. Indeed, almost without exception, the courts of appeals have upheld that power of Congress to proscribe wholly intrastate activities using the instrumentalities of interstate commerce. *See*, e. g., *United States v. Hasner*, 340 F.3d 1261 (11th Cir. 2003) (holding that the jurisdictional requirement of the federal mail fraud statute, 18 U.S.C. § 1341, was satisfied by the intrastate delivery of a letter by Federal Express, concluding specifically that "Congress properly exercised its power under the Commerce Clause[,] U.S. Const. art. I, § 8, cl. 3[,] by regulating private and commercial carriers as instrumentalities of interstate commerce--even though the conduct took place entirely intrastate"); *United States v. Gil*, 297 F.3d 93, 100 (2d Cir. 2002) (upholding the defendant's mail fraud conviction against a Commerce Clause challenge, reasoning that "private and commercial interstate carriers, which carry mailings between and among states and countries, are instrumentalities of interstate commerce, notwithstanding the fact that they also deliver mailings intrastate"); *United States v. Photogrammetric Data Servs., Inc.*, 259 F.3d 229, 249-52 (4th Cir. 2001) (upholding the constitutionality of the mail fraud statute, 18 U.S.C. § 1341, as applied to intrastate mailing placed with private or commercial interstate carriers), *cert. denied*, 535 U.S. 926, 122 S. Ct. 1295, 152 L. Ed. 2d 208 (2002); *United States v. Baker*, 82 F.3d 273, 275-76 (8th Cir. 1996) (upholding a conviction under the Travel Act, 18 U.S.C. § 1952(a) (2000), based on an extortion victim's use of an automatic teller machine . . . that "triggered an entirely intrastate electronic transfer" between two local banks, because an interstate network of ATMs is an instrumentality of interstate commerce).

Consonant with this nearly uniform view of Congress's power to proscribe the intrastate use of the instrumentalities

of interstate commerce, the courts of appeals, including the old Fifth Circuit,[2] routinely have held the interstate commerce requirement of various federal criminal statutes to be satisfied by the defendant's use of a telephone, because telephones -- even when used to communicate with another person in the same state -- are instrumentalities of interstate commerce. *See*, e.g., *United States v. Gilbert*, 181 F.3d 152, 159 (1st Cir. 1999) (upholding a conviction under 18 U.S.C. § 844(e) against a Commerce Clause challenge, reasoning that "the use of the telephone in this case to make a bomb-threat was, without more, sufficient to sustain jurisdiction under the interstate commerce clause"); *United States v. Clayton*, 108 F.3d 1114, 1117 (9th Cir. 1997) (holding that because cellular telephones and cellphone ID numbers are instrumentalities of interstate commerce, protectable under the second category of *Lopez*, no further inquiry was necessary to sustain a conviction under 18 U.S.C. § 1029(a)); *United States v. Kunzman*, 54 F.3d 1522, 1526-27 (10th Cir. 1995) (upholding the sufficiency of the indictment for money laundering where it alleged the use of a telephone to accomplish the scheme in question, saying specifically that "the indictment . . . specifically alleges an effect on interstate commerce through the use of interstate highways, the use of telephone and mails, and transactions involving banks and financial institutions engaged in interstate commerce. . . . this is sufficient to allege an effect on interstate commerce") (emphasis added); *Loveridge v. Dreagoux*, 678 F.2d 870, 874

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[2] By "old Fifth Circuit," I mean simply the Fifth Circuit prior to its division into the Fifth and Eleventh Circuits. Notably, in *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions handed down prior to the close of business on September 30, 1981.

(10th Cir. 1982) ("Proof of intrastate telephonic messages in connection with the employment of deceptive devices or contrivances is sufficient to confer jurisdiction in a § 10(b) and Rule 10b-5 action."); *Alley v. Miramon*, 614 F.2d 1372, 1379 (5th Cir. 1980) ("This Court has consistently held that the intrastate use of the telephone may confer jurisdiction over a private action under Section 10(b) and Rule 10b-5."); *Dupuy v. Dupuy*, 511 F.2d 641, 641 (5th Cir. 1975) ("This appeal presents a narrow question of law -- Does the making of intrastate telephone calls satisfy the jurisdictional requirement of 'use of any means or instrumentality of interstate commerce' found in § 10 of the Securities Exchange Act of 1934, 15 U.S.C.A. § 78j, and Securities and Exchange Commission Rule 10b-5, 17 C.F.R. 240.10b-5. The district court held that it did not, and granted the defendant's motion for summary judgment on a complaint which alleged intrastate calls as the only basis for federal jurisdiction. We reverse . . . ."); *McGregor Boulevard Church of Christ v. Walling*, 428 F.2d 401, 404 (5th Cir. 1970) (referring to a telephone as an instrumentality of interstate commerce).

Since it is almost axiomatic that Congress *can* prohibit the purely intrastate use of facilities of interstate commerce (e.g., telephones) to commit certain prohibited actions, the only question here is whether it did so in enacting § 1958.[3] Two of

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[3] This section provides, in full:

> (a) Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or uses or causes another (including the intended victim) to use the mail or any facility in interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as

the three circuit courts to address this issue have answered this question affirmatively, concluding that § 1958(a) confers jurisdiction over the purely intrastate use of an instrumentality of interstate commerce in furtherance of a murder-for-hire scheme. *See United States v. Richeson*, 338 F.3d 653 (7th Cir. 2003) (holding that the defendant's making of *intrastate* telephone calls, standing alone, satisfied § 1958's jurisdictional requirement because "when Congress elects to regulate under the second prong of *Lopez*, 'federal jurisdiction is supplied by the nature of the instrumentality or facility

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consideration for a promise or agreement to pay, anything of pecuniary value, or who conspires to do so, shall be fined under this title or imprisoned for not more than ten years, or both; and if personal injury results, shall be fined under this title or imprisoned for not more than twenty years, or both; and if death results, shall be punished by death or life imprisonment, or shall be fined not more than $250,000, or both.

(b) As used in this section and section 1959–

(1) "anything of pecuniary value" means anything of value in the form of money, a negotiable instrument, a commercial interest, or anything else the primary significance of which is economic advantage;

(2) "facility of interstate commerce" includes means of transportation and communication; and

(3) "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

18 U.S.C. § 1958.

used, not by separate proof of interstate movement'" (*quoting United* States *v. Marek*, 238 F.3d 310, 317 (5th Cir.) (en banc), *cert. denied*, 534 U.S. 813, 122 S. Ct. 37, 151 L. Ed. 2d 11 (2001))); *Marek*, 238 F.3d at 320 ("When a facility employed to advance murder-for-hire is in interstate or foreign commerce generally, the jurisdictional element of § 1958 is satisfied even though the particular use of the facility on the specific occasion in question is only intra state.") (emphasis in original).

However, the majority in this case, like the only other circuit court decision addressing § 1958(a)'s "facility in interstate commerce" requirement, *United States v. Weathers*, 169 F.3d 336, 341-42 (6th Cir.), *cert. denied*, 528 U.S. 838, 120 S. Ct. 101, 145 L. Ed. 2d 85 (1999), concludes otherwise. My colleagues begin their analysis by accurately noting that there is a discrepancy between the language of § 1958(a), which speaks of "facilit[ies] in interstate commerce," and the language used in § 1958(b)(2), which defines "facilit[ies] *of* interstate commerce." They then reconcile this inconsistency by holding that the phrase "facility in interstate commerce" refers solely to facilities that are used to actually cross state lines, while "facility of interstate commerce" merely provides *examples* of facilities that "must be used in interstate commerce to satisfy § 1958(a)." The majority concludes that because § 1958's operative – i.e., jurisdiction-conferring -- language is that found in § 1958(a), only the actual crossing of state lines in furtherance of a murder-for-hire scheme is actionable under this section. Thus, under the majority's view, the use of an instrumentality of interstate commerce (such as a telephone) in an intrastate manner is insufficient to confer federal jurisdiction under § 1958(a). My colleagues attempt to bolster this conclusion by invoking various canons of statutory construction, including the unremarkable maxim that all words in a statute must, to the

extent possible, be afforded independent meaning, the clear statement rule, and the rule of lenity. They also find support for their construction in § 1958's legislative history.

Simply stated, I believe that the majority's attempted reconciliation of § 1958(a) and (b)(2) does violence to § 1958's basic language and its overarching statutory scheme. I also find unpersuasive its reliance on the interpretive canons mentioned above and § 1958's legislative history. More particularly, there are four distinct reasons why I disagree with my colleagues' interpretation of this section. First, their reading of § 1958 is linguistically implausible. In this vein, I find persuasive the textual analysis of the Fifth Circuit in *Marek*. *See* 238 F.3d at 316. The *Marek* defendant[4] had tried to effect his murder-for-hire scheme by transferring funds between points within the State of Texas using Western Union, which uncontroversially is an instrumentality of interstate commerce. *See id.* at 313. In determining whether this entirely intrastate use of an instrumentality of interstate commerce satisfied § 1958(a)'s jurisdictional requirement, the court began by observing that "the key question of statutory construction presented . . . is whether, under the use prong of § 1958, the phrase 'in interstate or foreign commerce'

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[4] The *en banc Marek* decision actually resolved two different appeals in factually analogous cases under the murder-for-hire statute. My discussion will focus on the Fifth Circuit's evaluation of the *Marek* case, where the defendant made an intrastate transfer of funds by Western Union.

modifies 'use' or modifies 'facility.'"[5] 238 F.3d at 316. The court held that:

> Purely from a structural viewpoint, . . . "in interstate or foreign commerce" is an adjective phrase that modifies "facility," the noun that immediately precedes it -- *not* an adverbial phrase that modifies the syntactically more remote verb, "[to] use." We see the former conclusion as the more natural and sensible reading of the relevant portion of the statute. Primarily because of the proximity of "in interstate or foreign commerce" to "facility," the word which that phrase modifies is facility and not use. A contrary conclusion -- that "in interstate or foreign commerce" modifies "use" -- would require a strained structural interpretation of the statute.

Id.

Notably, the Seventh Circuit recently expressed its agreement with Marek's parsing of § 1958(a), holding that:

> We believe there is only one way to read the plain language of the murder-for-hire statute, and that is to require that the facility, and not its use, be in interstate or foreign commerce. We wholly agree with the Fifth Circuit that § 1958's construction, plain

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[5] To reiterate, the relevant portion of § 1958 reads: "Whoever. . . uses or causes another (including the intended victim) to use . . . the mail or any facility in interstate or foreign commerce, with intent that a murder be committed . . . shall be fined under this title or imprisoned for not more than ten years, or both . . . ." 18 U.S.C. § 1958(a).

> language, context in the realm of commerce clause jurisprudence, and legislative history all lead to the conclusion that "it is sufficient [under § 1958] that the defendant used an interstate commerce facility in an intra state fashion." *Marek*, 238 F.3d at 315. This reading of the statute makes sense from both a logical and legal standpoint; as noted in *Marek*, even the title of the statute, "Use of interstate commerce facilities in the commission of murder-for-hire," shows that Congress intended "interstate commerce" to modify "facility" and not "use." *Id.*[] at 321.

Richeson, 338 F.3d at 660. Indeed, it makes far more sense as a linguistic matter for the phrase "in interstate commerce" to modify the noun "facility." Had it been so inclined, Congress could easily have drafted § 1958(a) to prohibit "the use in interstate commerce of [certain] facilities." But that is not the way § 1958(a) reads. Thus, in my view, the plain language of this section indicates that so long as the facility in question is one in interstate commerce, i.e., is an instrumentality of interstate commerce, even its purely intrastate use confers jurisdiction under § 1958(a).[6]

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[6] I recognize, as did the Marek court, the Fifth Circuit's holding in Dupuy that the "in interstate commerce"/"of interstate commerce" distinction is a meaningful one when comparing the jurisdictional elements of the Securities Act of 1933 and the Securities Exchange Act of 1934. *See Marek*, 238 F.3d at 319 n.44 (*citing Dupuy*, 511 F.2d at 642-43). Indeed, my view regarding the appropriate reconciliation of § 1958(a) and (b)(2) does not imply that "that similarly varying phraseology never can have statutory significance." *Id.* Rather, it is only to say that "based on the grammatical structure of § 1958 and the use of both phrases interchangeably in the statute and its legislative history, . . . Congress's particular deployment of these two prepositions in §

Second, by straining to afford the words "in" and "of" distinct meanings, the majority has read the preface to § 1958(b) and an entire subsection -- § 1958(b)(2) -- out of the statute completely. The preface to § 1958(b) reads: "as used in this section . . . --." [7] By holding that the phrase "facility in interstate commerce," as used in § 1958(a), is meaningfully different from the phrase "facility of interstate commerce," as used in 1958(b)(2), the majority has rendered nugatory the language "as used in this section." Indeed, the only way to plausibly interpret Congress's express statement that the phrase "facility of interstate commerce" is used in § 1958(a) is to construe that phrase as synonymous with the phrase "facility in interstate commerce," which is the language actually contained in § 1958(a).

As for § 1958(b)(2), again, this subsection provides that "'facility of interstate commerce' includes means of transportation and communication." However, if "facilities of interstate commerce" are not the same as "facilities in interstate commerce," § 1958(b)(2) defines a non-existent term and as such is a functional nullity. Thus, in espousing this reading, the majority has egregiously contravened an important canon of statutory interpretation to which it claims to adhere, i.e., that all words in a statute must, to the extent possible, be afforded independent meaning and significance.

My colleagues attempt to avoid this basic problem simply by saying that the phrase "facility of interstate commerce," as set forth in § 1958(b)(2), merely provides examples of

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1958 is not dispositive of this case." *Id.*

[7] Thus, when read together with its preface, § 1958(b)(2) reads: "As used in this section . . . 'facility of interstate commerce' includes means of transportation and communication."

facilities "that must be used in interstate commerce to satisfy § 1958(a)." However, this argument is implausible. If the phrase "in interstate commerce," as used in § 1958(a), modifies the verb "uses," as the majority says it does, the noun "facility" is unmodified. Any facility -- whether or not it is one typically deemed an instrumentality of interstate commerce, such as a telephone -- is sufficient to confer jurisdiction under § 1958(a) so long as it is used to actually cross state lines.

I agree that the physical crossing of state borders, whether by the defendant personally or some process that he sets in motion (like a telephone call or the mailing of a letter), plainly satisfies § 1958(a)'s jurisdictional requirement. However, if the actual crossing of state borders is the only way to confer jurisdiction under this section, then in listing 2 types of facilities that, if used to cross state borders, will satisfy § 1958(a)'s jurisdictional requirement, § 1958(b)(2) does absolutely no work. Put differently, the majority reads § 1958(a) to say that any[8] (and only the) actual crossing of state borders is sufficient to invoke § 1958(a). This broad, general proposition necessarily subsumes within it the idea that any particular interstate movement, for example, the interstate use of a means of communication or transportation, is sufficient to invoke § 1958(a). Thus, under the majority's

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[8] Indeed, the essentially incidental interstate movement of Drury's cellular telephone signal was about as minimal as possible. His call originated in Georgia and was received in Georgia as well; it is merely that during the intervening seconds, the signal from Drury's phone -- unbeknownst to appellant -- was momentarily routed through a switching station in Jacksonville, Florida. If this interstate movement satisfies § 1958(a), then any movement across state lines will confer jurisdiction under this section.

reading, the language of § 1958(b)(2) accomplishes absolutely nothing.

Moreover, I find it evident that § 1958(b)(2) is structurally housed in a definitional -- not an exemplary -- subsection of the statute, i.e., § 1958(b). Indeed, § 1958(b)(1) unquestionably *defines* the phrase "anything of pecuniary value," and, equally plainly, § 1958(b)(3) *defines* the term "State." The fact that § 1958(b)(3) does so by using the term "includes" instead of "means" -- *compare* § 1958(b)(1) ("'anything of pecuniary value' *means* anything of value in the form of money, a negotiable instrument, a commercial interest, or anything else the primary significance of which is economic advantage" *with* § 1958(b)(3) ("State" *includes* a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States") -- does not render it any less definitional. Thus, the fact that § 1958(b)(2) also uses the term "includes" does not render that subsection exemplary.

Not surprisingly, the majority cites no authority for its reconciliation of § 1958(a) and (b)(2). This is not to dispute their recognition that § 1958(a) and (b)(2) use different language, or to say that these subsections need not be reconciled. Rather, it is merely to say that the reconciliation that does the least damage to the language enacted by Congress -- and affords the maximum amount of credence to the canon that all words in a statute should be given effect -- is to read "facilities of interstate commerce" as being synonymous with "facilities in interstate commerce." Although this may deprive the word "of" of some independent significance, this reading is far less damaging to § 1958's statutory scheme than is the reading endorsed by the majority, and the attendant nullification of § 1958(b)(2) in its entirety.

Third, as the *Marek* court noted, in 1990 Congress enacted an amendment to the Travel Act, 18 U.S.C. § 1952 -- of which section 1958's murder-for-hire prohibition originally was a part -- clarifying that the purely intrastate use of an instrumentality of interstate commerce is sufficient to satisfy that section's jurisdictional requirement. *See*, e.g., *United States v. Baker*, 82 F.3d 273, 275-76 (8th Cir. 1996) (upholding a conviction under § 1952(a) based on an extortion victim's use of an automatic teller machine that "triggered an entirely intrastate electronic transfer" between two local banks, because interstate network of ATMs is a facility in interstate commerce); *United States v. Heacock*, 31 F.3d 249, 255 (5th Cir. 1994) (holding that "whenever a person uses the United States Post Office to deposit, to transport, and to deliver parcels, money, or other material by means of the mail, that person clearly and unmistakably has used a 'facility in interstate commerce,' irrespective of the intrastate destination of the item mailed," and that such intrastate use satisfies the jurisdictional requirement of the Travel Act). Notably, to accomplish this clarification Congress changed the language of § 1952 to mirror the language now found in § 1958(a), targeting "[w]hoever travels in interstate or foreign commerce or uses the mail or any facility *in* interstate or foreign commerce." 18 U.S.C. § 1952(a) (emphasis added). Based on this history, the *Marek* court concluded that "as Congress thus expressly made clear that § 1952 applies to intrastate mailings, and did so by importing § 1958's wording into § 1952, logic dictates that precisely the same wording in § 1958 must apply equally to intrastate use of other interstate facilities, such as Western Union." 238 F.3d at 317. I agree fully with this reasoning; Congress's clarification that the purely intrastate use of an instrumentality of interstate commerce falls within the ambit of § 1952(a) by adopting the precise wording used in § 1958(a) strongly counsels in favor

of reading § 1958(a) to reach such purely intrastate activities as well.

Finally, to hold that § 1958(a) confers jurisdiction over only murder-for-hire cases involving the actual crossing of state lines is inconsistent with Congress's desire to provide broad, concurrent federal jurisdiction over cases of this type. *See Marek*, 238 F.3d at 323. The Senate report that accompanied the enactment of § 1958 explicitly sets forth this legislative purpose:

> [T]he committee is aware of the concerns of local prosecutors with respect to the creation of concurrent federal jurisdiction in an area, namely murder cases, which has heretofore been the almost exclusive responsibility of state and local authorities. [H]owever, the committee believes that the option of federal investigation and prosecution should be available when a murder is committed or planned as consideration for something of pecuniary value and the proper federal nexus, such as interstate travel, use of the facilities of interstate commerce, or use of the mails, is present.

S. Rep. 98-225, pt. 7, at 304-05 (1983), 1984 U.S.C.C.A.N. 3182, 3484. To say that concurrent jurisdiction does not exist unless the scheme in question actually crosses state lines, and thus that Congress opted not to exercise the full extent of its Commerce power -- indeed, even the majority does not say that Congress lacked the *authority* to include within § 1958(a)'s scope the intrastate use of the instrumentalities of interstate commerce is facially inconsistent with the legislature's desire to provide the option of federal prosecution whenever "the proper federal nexus" is present. Moreover, as we discuss more fully infra, § 1958's legislative

history strongly suggests that Congress recognized three distinct "proper federal nexus[es]," namely, "interstate travel, *use of the facilities of interstate commerce*, or use of the mails." *Id.* (emphasis added).

Thus, I believe that the phrase " in interstate commerce," as used in § 1958(a), should be read to modify the noun "facility" as opposed to the verb "uses," and is synonymous with the phrase "of interstate commerce," as used in § 1958(b)(2). The product of this reading is that the purely intrastate use of a facility in (i.e., instrumentality of) interstate commerce confers jurisdiction under § 1958(a). Indeed, § 1958 provides a classic example of Congress regulating the *instrumentalities* of interstate commerce. As the *Marek* court put it, "when Congress regulates and protects under the second *Lopez* category . . . federal jurisdiction is supplied by the nature of the instrumentality or facility used, not by separate proof of interstate movement." 238 F.3d at 317. Here, the proofs introduced at trial establish that Drury used a cellular telephone to contact a person whom he believed to be a hitman in an attempt to arrange the murder of his wife. This, standing alone, is sufficient to confer federal jurisdiction under § 1958(a).

None of the arguments raised by my colleagues in support of their contrary holding are persuasive. First, as explained above, the majority's linguistic parsing of § 1958(a)'s phrase "uses . . . any facility in interstate commerce" -- and specifically its conclusion that the phrase "in interstate commerce" modifies the verb "uses" -- misses the mark. Second, I find especially unpersuasive the majority's reliance on the maxim that all words in a statute must, to the extent possible, be given independent meaning. Although I fully agree with this rule as a canon of statutory interpretation, the majority, as I have explained, has directly undermined this

maxim by reading the preface to § 1958(b) and § 1958(b)(2) out of the statute completely.

Third, the majority attempts to support its reading of § 1958 by invoking the clear statement rule, i.e., the principle that Congress must clearly indicate its desire to deprive the states of dominion over matters traditionally within their legislative purview. *See Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 209, 112 S. Ct. 560, 567-68, 116 L. Ed. 2d 560 (1991) ("We have been wary of extending the effect of congressional enactments into areas traditionally governed by the States, unless Congress has directed us to do so by an unmistakably clear statement. Indeed, in the cases in which we have employed the clear statement rule outside the Eleventh Amendment context, we have recognized the rule's constitutional dimensions." (*citing Gregory v. Ashcroft*, 501 U.S. 452, 461, 111 S. Ct. 2395, 2401, 115 L. Ed. 2d 410 (1991) and *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65, 109 S. Ct. 2304, 2309, 105 L. Ed. 2d 45 (1989) and *United States v. Bass*, 404 U.S. 336, 349, 92 S. Ct. 515, 523, 30 L. Ed. 2d 488 (1971))). The simple response is that Congress has not truly deprived the states of anything. There is not a single murder-for-hire case that is removed from the jurisdiction of the states by § 1958. Instead, this section merely provides *concurrent* federal jurisdiction over murder-for-hire schemes that can be brought to bear in cases where the resources of the federal government may be needed. As indicated in the legislative history cited by the majority, Congress did not intend that

> all or even most [murders-for-hire] should become matters of federal responsibility. Rather, federal jurisdiction should be asserted selectively based on such factors as the type of defendants reasonably believed to be involved and the relative ability of the

> federal and state authorities to investigate and prosecute. . . . Cooperation and coordination between federal and state officials should be utilized to ensure that the new murder-for-hire statute is used in appropriate cases to assist the states rather than to allow the usurpation of significant cases by federal authorities that could be handled as well or better at the local level.

S. Rep. 98-225, pt. 7, at 305 (1983), 1984 U.S.C.C.A.N. 3182, 3484. Accordingly, the federalism-based concerns of my colleagues are largely unfounded.

Similarly unpersuasive is the majority's invocation of the rule of lenity. As my colleagues recognize, one of the important principles undergirding this rule is that fairness, equity and due process dictate that a criminal law must put the defendant on notice that a given action is prohibited. If a defendant cannot determine with some measure of certainty that statute X prohibits act Y, the statute should not be construed to encompass act Y. Here, the majority says that "applied to § 1958, this rule instructs that § 1958(a)'s jurisdictional element should be interpreted to include only the use of facilities that are actually engaged in interstate commerce," i.e., facilities that are used to cross state lines. Yet under the majority's interpretation of § 1958, to know whether his actions were prohibited under the federal murder-for-hire statute, Drury would have to know the precise route of the signal from the cellular telephone calls he made in furtherance of his homicidal scheme. Not only is there no evidence in the record that Drury knew that his calls were routed through a switching station in Florida, but more generally, this plainly is not a matter of which most defendants who are not telecommunications experts are likely to be aware. Thus, as is vividly illustrated by the facts of this

case, the majority's reading of § 1958 undermines the fairness principle underpinning the rule of lenity. More fundamentally, it is difficult to accept the majority's implication that Drury could possibly have believed that the retention of a hitman to murder his wife was not legally prohibited.

Finally, as I view them, neither of the legislative reports cited by my colleagues actually supports their conclusion that only the use of a facility to cross state lines is actionable under this section. The Senate report discussed by the majority says that "the term 'facility of interstate commerce' is . . . defined to include means of transportation and communication. Thus, an interstate telephone call is sufficient to trigger federal jurisdiction." S. Rep. 98-225, pt. 7 at 306 (1983), 1984 U.S.C.C.A.N. 3182, 3485 (emphasis added). Under the majority's reading of § 1958, however, this could not be. The phrase "facility of interstate commerce" appears only in § 1958(b)(2), which is not the substantive, i.e., jurisdictional, portion of the statute. Instead, according to the majority, that section is exemplary only. However, by saying that the language of § 1958(b)(2) is jurisdiction-conferring, this Senate report plainly indicates that § 1958(b)(2) authoritatively defines the substantive prohibition found in § 1958(a), thereby necessarily rendering "facilities in interstate commerce" synonymous with "facilities of interstate commerce."

In a similar vein, the same Senate report says that "the option of federal investigation and prosecution should be available when a murder is committed or planned . . . and the proper federal nexus, such as interstate travel, use of the facilities of interstate commerce, or use of the mails is present." *Id.* at 305, 3484 (emphasis added). This says it about as clearly as possible: the use of facilities of interstate

commerce was viewed by the drafters of the federal murder-for-hire statute as one wholly independent basis for federal jurisdiction. This also strongly implies that there is no substantive difference between the "facilities of interstate commerce" to which the report refers and "facilities in interstate commerce," the use of which in furtherance of a murder-for-hire scheme is prohibited under § 1958(a). Notably, the Senate report explicitly distinguishes the use of such facilities from interstate travel, thereby indicating that the purely intrastate use of the facilities, i.e., instrumentalities, of (or in) interstate commerce is sufficient to confer jurisdiction under § 1958(a).

Similarly, the House report that attended the introduction of the Travel Act explicitly says that "the interstate tentacles of this octopus known as 'organized crime' . . . can only be cut *by making it a Federal offense to use the facilities of interstate commerce* in the carrying on of [certain] nefarious activities [including crimes of violence]." H.R. Rep. No. 87-966 (1961), reprinted in 1961 U.S.C.C.A.N. 2664, 2665 (emphasis added). This plainly indicates that the drafters of what became § 1958 wanted to make illegal the use of "facilities of interstate commerce" to commit crimes of violence. That the substantive prohibition in the federal murder-for-hire statute, § 1958(a) contains the language "facilities in interstate commerce" strongly suggests that these phrases were viewed by the Travel Act's drafters as interchangeable. To conclude otherwise requires not only the assumption that the drafters of the Travel Act viewed these phrases as substantively distinct, but also that following the promulgation of H.R. 87-966, the drafters changed their minds and decided that it was not the use of facilities of interstate commerce, but rather the use of facilities in interstate commerce, that was problematic and should be prohibited under federal law. Unsurprisingly, there is

absolutely no support in § 1958's legislative history for the notion that such a legislative about-face occurred.

The same House report later says that the Travel Act prohibits not only actual interstate travel in furtherance of certain activities, including the commission of a crime of violence, but "[i]t *also* prohibits the use of other interstate transportation facilities, including the mail, under the same requirements . . . with regard to travel." *Id.* at 2666 (emphasis added). The report never says that the use of such facilities must be of an interstate nature. Indeed, it says simply that the mere use of the mail to commit a crime of violence is sufficient to confer Travel Act jurisdiction. I cannot see how the majority interprets this report to support the conclusion that the use of the mail (or, by necessary implication, a telephone) is insufficient, standing alone, to confer jurisdiction under § 1958.

As a corollary to my conviction that the intrastate use of an instrumentality of interstate commerce such as a telephone satisfies § 1958's jurisdictional nexus, I believe that the district court did not err under *United States v. Gaudin* by instructing the jury that a pay or cellular phone is a *per se* facility in interstate commerce.

In *Gaudin*, the Court reaffirmed that the Fifth and Sixth Amendments require that "criminal convictions . . . rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." 515 U.S. at 510, 115 S. Ct. at 2313. The issue in that case was whether the materiality of a false statement on a federal loan application was an element of a violation of 18 U.S.C. § 1001 that needed to be found by a jury. In holding that it was, the Court said that materiality is a classic mixed question of law and fact, and as such is

properly resolved by a jury. *See id.* at 512-14, 115 S. Ct. at 2314-15.

This, to reiterate, is a "*Lopez 2*" case, because the government was required to establish that Drury "used . . . [a] facility in interstate or foreign commerce" in furtherance of his murder-for-hire scheme. 18 U.S.C. § 1958. By contrast, this is not a "*Lopez 3*" case, where the requisite connection to interstate commerce is the effect of the defendant's actions on interstate commerce.[9] In my view, this

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[9] In "*Lopez 3*" cases, the courts of appeals generally (but not always) have found that the requisite effect on interstate commerce is an element of the offense that, under *Gaudin*, must be submitted to the jury. For example, in *United States v. Vasquez*, the Second Circuit held that a jury charge that heroin or cocaine trafficking necessarily affects interstate or foreign commerce "may not pass muster" under *Gaudin*. *United States v. Vasquez*, 267 F.3d 79, 89 (2d Cir. 2001). Although the *Vasquez* court said that prior to *Gaudin* its jurisprudence deemed jurisdictional questions such as whether the alleged conduct affected interstate commerce as being properly resolved by the court, it recognized that these actually are mixed questions of law and fact that, under *Gaudin*, must be resolved by a jury. We held similarly in *United States v. Castleberry*. *See* 116 F.3d 1384, 1389 (11th Cir. 1997) ("*Castleberry* is correct that *Gaudin* requires a jury, and not a judge, to determine each element of the crime to which he is charged with. However, *Castleberry* is simply wrong in arguing that the jury in his case did not decide each element of his Hobbs Act convictions. It is clear to us that the jury decided the interstate commerce element.").

By contrast, in *United States v. Gomez*, an interstate arson case, the district court instructed the jury that to convict the defendant it had to find "that on or about the date charged in the indictment, the building named in the indictment was used in interstate or foreign

is a distinction that makes a great difference. Whereas the impact of a defendant's actions on interstate commerce is an element of offenses requiring an effect on interstate commerce, this is not so in cases where the defendant need only use a facility in (or of) interstate commerce. Indeed, the labeling of a given facility as one in (or of) interstate commerce -- or, in the terms used by these cases, as an

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commerce or in any activity affecting interstate or foreign commerce." 87 F.3d 1093, 1097 (9th Cir. 1996). The district court then defined interstate commerce, saying: "A building is used in interstate commerce, or any activity affecting interstate commerce, if the building itself is used for a business or commercial purpose or if that building purchases, sells, or uses goods that originated or came from out of state. A residential apartment building with multiple rental units is a building in interstate commerce." *Id.* The Ninth Circuit affirmed, reasoning that:

> We find that these instructions properly encompassed the jury's fact-finding role. [The first] instruction . . . required the jury to find whether the building damaged or destroyed was used in interstate commerce. [The second] instruction . . . gave the proper legal test for determining whether a building affects interstate commerce. Together these instructions required the jury to determine whether the building was a multi-unit residential building that was in use as a rental property at the time of the charged incident, which is the proper factual inquiry. If they found that it was a rental property, then the instructions required them to find that the interstate commerce element of the offense was satisfied. These instructions correctly delegated the factual determination to the jury, leaving the determination of the legal standard to the court.

Id.

instrumentality of interstate commerce — is one that we and other courts of appeals previously have categorized as purely legal. *See Spilker v. Shayne Labs., Inc.*, 520 F.2d 523, 524 (9th Cir. 1975) ("The only issue in this appeal is a simple question of law. Does the fact that the defendants made two intrastate telephone calls connected to a securities transaction satisfy the jurisdictional requirement of 'use of any means or instrumentality of interstate commerce' . . . ."); *Dupuy*, 511 F.2d at 641 ("This appeal presents a narrow question of law — Does the making of intrastate telephone calls satisfy the jurisdictional requirement of 'use of any means or instrumentality of interstate commerce' found in s 10 of the Securities Exchange Act of 1934 . . . ."); *Copp Paving Co. v. Gulf Oil Corp. (In re W. Liquid Asphalt Cases)*, 487 F.2d 202, 204 (9th Cir. 1973) ("The production of asphalt for use in interstate highways rendered the producers 'instrumentalities' of interstate commerce and placed them 'in' that commerce as a matter of law."), *rev'd on other grounds by* 419 U.S. 186, 95 S. Ct. 392, 42 L. Ed. 2d 378 (1974).

Instead, in cases where the government must establish that the defendant used a facility in (or of) interstate commerce, the element of the offense that must be submitted to the jury is the use of that facility, not whether the element is "in" or "of" interstate commerce. Thus, for example, where a telephone is concerned, the jury must find beyond a reasonable doubt that the telephone was used, not that the telephone is a facility in interstate commerce. Indeed, to me it is hard to imagine that a jury would be free to find that a telephone is not a facility in (or of) interstate commerce which, for the reasons set forth above, is synonymous with an instrumentality of interstate commerce. Yet the majority opinion effectively would allow one jury to conclude on Monday that a telephone is an instrumentality of interstate

commerce and another jury to conclude on Tuesday, in another case, that a telephone is not an instrumentality of interstate commerce. I find it wholly implausible that Congress intended such a result.

Furthermore and quite importantly, in this case there is an even more compelling reason to say that *Gaudin* does not require the submission to the jury of the question whether Drury used a facility in interstate commerce. In § 1958(b)(2), Congress expressly and unambiguously has defined the phrase "facility of interstate commerce" -- which, for the reasons set forth above, must be interpreted as synonymous with "facility in interstate commerce" -- to include "means of transportation and communication." 18 U.S.C. § 1958(b)(2). Accordingly, it is simply untenable to say that the satisfaction of section 1958's "facility in interstate . . . commerce" requirement -- as opposed to the requirement that such a facility be used -- is an element of the offense that must be submitted to the jury. Chief Justice Rehnquist, concurring in *Gaudin*, undertook a discussion that bears directly on this point. He wrote:

> Nothing in the Court's decision stands as a barrier to legislatures that wish to define -- or that have defined -- the elements of their criminal laws in such a way as to remove issues such as materiality from the jury's consideration. We have noted that "the definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." Within broad constitutional bounds, legislatures have flexibility in defining the elements of a criminal offense. .

515 U.S. at 525, 115 S. Ct. at 2321 (Rehnquist, C.J., concurring) (*quoting Staples v. United States*, 511 U.S. 600,

634, 114 S. Ct. 1793, 1796, 128 L. Ed. 2d 608 (1994)) (other citations omitted). Thus, even were the nature of a particular facility (or instrumentality) -- as opposed to the defendant's use of that facility -- an element that in the context of other statutes would have to be submitted to the jury under *Gaudin*, the satisfaction of this requirement has been legislatively determined here. By expressly defining the phrase "facility in[of] interstate . . . commerce," Congress may fairly be said to have eliminated this as an element of the murder-for-hire offense under § 1958 and thus removed it from the jury's consideration.

In short, I believe the majority has read § 1958(a)'s jurisdictional requirement in an overly constrictive manner. It has done so by parsing the language of this subsection and of § 1958(b)(2) in a way that lacks textual foundation and is not supported by -- indeed, directly undermines -- the canons of statutory interpretation on which it purports to rely or by § 1958's legislative history. This error also has led my colleagues to find error under *Gaudin* where none truly exists. Despite these basic analytical flaws, however, the majority's ultimate resolution of this case is correct because it affirms Drury's conviction in all respects. Accordingly, I concur in the judgment reached.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 02-12924
[Decided: February 3, 2004]
[Filed: February 3, 2004,]

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CARL M. DRURY, JR., M.D.,
Doctor,
Defendant-Appellant.

Before EDMONDSON, Chief Judge, TJOFLAT, ANDERSON, BIRCH, DUBINA BLACK, CARNES, BARKETT, HULL, MARCUS and WILSON, Circuit Judges.

OPINION

A member of this Court in active service having requested a poll on the suggestion of rehearing en banc and a majority of the judges in this Court in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the above cause shall be reheard by this court en banc. The previous panel's opinion is hereby VACATED.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 02-12924
[Decided: January 14, 2005]
[Filed: January 14, 2005.]

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CARL M. DRURY, JR., M.D.,
Doctor,
Defendant-Appellant.

Before EDMONDSON, Chief Judge, TJOFLAT, ANDERSON, BIRCH, DUBINA, BLACK, CARNES, BARKETT, HULL, MARCUS, WILSON and PRYOR, Circuit Judges.

OPINION

On February 3, 2004, we granted rehearing en banc to consider whether the purely interstate use of a facility of interstate commerce -- namely, a telephone -- satisfied the jurisdictional requirement of 18 U.S.C. § 1958, the federal murder-for-hire statute. *See United States v. Drury*, 358 F.3d 1365 (11th Cir. 2004). The linguistic issue in the case was the meaning of the phrase "uses . . . any facility in interstate or

foreign commerce" — specifically, whether "in interstate . . . commerce" modified "uses" or "facility."

In the time since we granted rehearing en banc, Congress has amended the statute to resolve definitively that precise question. As part of the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638, Congress amended § 1958 by "striking 'facility in' and inserting 'facility of.'" *Id.* § 6704. The new version of § 1958 thus reads, "Whoever . . . uses . . . any facility of interstate or foreign commerce. . . .", thereby obviating the question of statutory construction at issue in this case for all future convictions under § 1958. This amendment makes clear that § 1958 now establishes federal jurisdiction whenever any "facility of interstate commerce" is used in the commission of a murder-for-hire offense, regardless of whether the use is interstate in nature (i.e. the phone call was between states) or purely intrastate in nature (i.e. the phone call was made to another telephone within the same state).

In light of this development, this case no longer merits en banc review. Rehearing en banc is disfavored and ordinarily will not be ordered unless it is necessary to maintain uniformity in the Court's decisions or -- as was the case here -- if "the proceeding involves a question of exceptional importance." Fed. R. App. Proc. 35(a); see also 11th Cir. R. 35-3. Simply put, this case no longer involves such a question. We therefore VACATE the order of February 3, 2004 insofar as it grants rehearing en banc in this case. We do not, however, reinstate the panel opinion, and instead we REMAND the case to the panel for further consideration.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 02-12924

[Filed January 18, 2005]

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)
v.	)
CARL M. DRURY, JR., M.D., Doctor, Defendant-Appellant.	)

Appeal from the United States District Court for the Southern District of Georgia

Before BARKETT, MARCUS and ALARCÓN*, Circuit Judges.

* Honorable Arthur L. Alarcón, United States Circuit Judge for the Ninth Circuit, sitting by designation.

OPINION

This case comes before us for a second time after this Court, sitting *en banc*, vacated an earlier opinion of this panel, *United States v. Drury*, 344 F.3d 1089 (11th Cir. 2003), and granted rehearing *en banc*, *see United States v. Drury*, 358 F.3d 1280 (11th Cir. 2004), and then subsequently vacated the grant of *en banc* rehearing in light of a congressional amendment to the statute at issue in the case, remanding the matter to this panel for further consideration. *See United States v. Drury*, 358 F.3d 1280 (11th Cir. 2004).

Drury appeals his convictions for violating the federal murder-for-hire statute, 18 U.S.C. § 1958, and for possessing a firearm in connection with a crime of violence, in violation of 18 U.S.C. § 924(c). Drury contends that the jurisdictional element of § 1958(a) is properly interpreted as requiring the government to prove that he used the telephone in interstate commerce to commit murder-for-hire, and that it failed to do so at trial. In addition, Drury argues that the trial court committed reversible error by (1) instructing the jury that a pay phone or a cellular phone is a "facility in interstate commerce" as a matter of law; (2) denying him the opportunity to introduce evidence of his character for truthfulness; (3) excluding testimony from his son regarding a prior consistent statement Drury allegedly made after his arrest; and (4) declining to give two jury instructions he requested.

After thorough review, we conclude that the evidence presented was sufficient to establish the jurisdictional element of § 1958(a) under any reading of that provision and, therefore, we need not determine whether Drury's interpretation is correct. Moreover, we hold that the district

court committed no reversible error as to its evidentiary rulings or its jury instructions. Accordingly, we AFFIRM.

I.

A.

Dr. Drury's scheme to procure the murder of his wife, Mary Drury, was apparently set into motion when Drury invited his friend Steven Whatley to stay in his home after Whatley separated from his wife in March 2001. Whatley, an Agent of the Bureau of Alcohol, Tobacco, and Firearms ("ATF") in Brunswick, Georgia, resided with Drury intermittently for several months. During this time, Drury complained bitterly and frequently about his wife, telling Whatley that he needed "some relief" from her, and that "she needed to go." Drury eventually made his purpose clear, telling Whatley that "Mary has got to die" and "Mary has got to go," and insisting that "it had to look like an accident." Ultimately, Drury asked Whatley if he would kill Mary Drury or find someone else to do so.

Whatley reported this conversation to his supervisor at the Federal Law Enforcement Training Center, who put Whatley in touch with ATF Agents John Limbach and Louis Valoze. The agents provided Whatley with Valoze's undercover cellular telephone number, and instructed him to give Drury the number if he approached Whatley again about murdering his wife. When Drury did so, Whatley gave him Agent Valoze's phone number, with its local South Georgia area code.

Drury placed a total of four calls to Agent Valoze's cellular phone. All four were made from pay phones in Brunswick, Georgia, and both Drury and Valoze were physically located within the state of Georgia at all times during the four telephone conversations. Drury first called Agent Valoze on August 7, 2001, and arranged to meet him at a local restaurant the next day. At that meeting, Drury formulated a plan with Valoze to procure the murder of Mary Drury. Valoze told Drury that he required a gun and a fee of $2,000. Drury provided Valoze with detailed information about his wife and her habits, including her place of employment, her work schedule, and the type of car she drove. Drury stressed that "[i]t just needs to be an accident." He told Valoze that he would call him again in a few days.

Drury placed his second call to Valoze's cellular phone on August 9, 2001. During this conversation, Drury provided Valoze with Mary Drury's license plate number. Drury also negotiated the fee for the murder down to $750.

On August 15, 2001, Drury placed a third call to Agent Valoze's cellular phone. He arranged to meet Valoze at 9:00 p.m. on August 20, 2001, outside a restaurant in Darien, Georgia. At that meeting, Drury provided Valoze with an unloaded .38 caliber handgun and -- after further negotiating the fee --$250 as payment for the murder. Drury told Valoze that he wanted to wait to see if his wife would sign their divorce papers, and if so, he wanted Valoze only "to follow her" to find out whether she was seeing another man. If she refused to sign the papers, Drury said, "we'll go ahead." Drury and the putative hit-man agreed to speak again at the end of the week.

Drury place his fourth and final call to Agent Valoze's cellular phone on August 24, 2001. During this call, Drury

informed Valoze that his wife had not signed the papers, and that Valoze should proceed with the murder as planned. Drury advised Valoze that his wife was driving back from her sister's home in northern Georgia, and that he "could . . . catch her on the way back, it'll be a good, good time." Drury told Valoze, "you the man," to which Valoze responded, "all right Doc I'm gonna do this thing." Following this final conversation, ATF agents arrested Drury.

At Drury's trial, the government introduced evidence regarding the paths traveled by the telephone signals that facilitated the calls between Drury and Agent Valoze. A representative of BellSouth Telecommunications, the company that serviced the pay phones Drury used to contact Valoze, testified that all calls from the telephones Drury used are routed to a switching center in Brunswick, Georgia, from where they are routed to their intended destination, whether local, interstate, or international. The signal from a purely local call would not leave Georgia, but in the case of a call to a cellular phone, it might. A representative of VoiceStream Wireless, the company that serviced Agent Valoze's cellular phone, then testified that Drury's calls to Valoze's phone all traveled through a VoiceStream switching center in Jacksonville, Florida, before being routed back to Agent Valoze's cellular phone in Georgia.

Drury's basic defense at trial was that the whole murder-for-hire scheme was merely an ATF role-playing exercise. He testified that he never spoke to Whatley about killing his wife, but merely about his concern that she was having an affair and his desire to hire a private investigator. Drury claimed that Whatley then informed him that Drury could participate in an ATF training program, whereby he would pretend to hire a murder-for-hire, and ATF agents would place Mary Drury under surveillance and provide Drury with a detailed

written report of their findings. Drury denied ever actually intending to have his wife killed, and stated that his $250 payment to Agent Valoze was simply reimbursement for the surveillance.

To support his role-playing explanation, Drury noted that the purported "trigger" for proceeding with the murder of Mary Drury -- her refusal to sign divorce papers -- was, in fact, a falsification; the couple had no plans to divorce. Mrs. Drury's testimony at trial corroborated her husband's claim that the couple had never discussed divorce. Whatley, in his trial testimony, denied ever discussing or engaging in role play with Drury. Drury, in turn, called two character witnesses, Ted Turner and Joseph Bridgers, who attested to Whatley's reputation for untruthfulness.

Drury also attempted to introduce his son Don's testimony that Drury had told him about the role-playing exercise while sitting in a police vehicle shortly after his arrest. The government objected, arguing that the testimony was inadmissible because Drury had a motive to fabricate the story after his arrest, since he had not told anyone about the role play beforehand. The district court excluded Don's testimony.

Drury also sought to introduce testimony about his character for truthfulness, under Federal Rule of Evidence 608. The government objected, arguing that Rule 608 was inapplicable since it had questioned only Drury's credibility generally, not his character for truthfulness. The district court ruled the testimony inadmissible.

In addition, Drury submitted, prior to trial, two proposed jury instructions -- one pertaining to the reliability of government investigations, and the other to witness' reputations for truthfulness. The trial court gave neither of the

requested instructions. However, the trial court provided the jury with its own instructions on witness credibility, both before and after trial. The trial court also instructed the jury that "pay phones and cellular phones are 'facilities in interstate commerce' under federal law." Drury objected to this charge and to the district court's refusal to give his requested instructions.

B.

A jury convicted Drury of plotting a murder-for-hire in violation of Title 18 U.S.C. § 1958, and of the related offense of possessing a firearm in connection with a crime of violence, in violation of 18 U.S.C. § 924(c). At the time of Drury's conviction, § 1958 provided:

> § 1958. Use of interstate commerce facilities in the commission of murder-for-hire
>
> (a) Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or uses or causes another (including the intended victim) to use the mail or any facility in interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, or who conspires to do so, shall be fined under this title or imprisoned for not more than ten years, or both; and if personal injury results, shall be fined under this title or imprisoned for not more than twenty years, or both; and if death results, shall be punished by death or life imprisonment, or shall be fined not more than $250,000, or both.

(b) As used in this section and section 1959–

(1) "anything of pecuniary value" means anything of value in the form of money, a negotiable instrument, a commercial interest, or anything else the primary significance of which is economic advantage;

(2) "facility of interstate commerce" includes means of transportation and communication; and

(3) "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

18 U.S.C. § 1958 (2000).[1]

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[1] Section 1958 was originally enacted as part of the Interstate Travel in Aid of Racketeering Statute ("Travel Act"), codified at Title 18 U.S.C. § 1952. The Travel Act, in its original form, established federal jurisdiction over organized crime and racketeering offenses having a nexus with interstate commerce, but did not specifically include murder-for-hire within its scope.

The original Travel Act, entitled "Interstate and foreign travel or transportation in aid of racketeering offenses," established penalties for anyone who "travels in interstate or foreign commerce or uses any facility or foreign commerce, including the mail, with intent to (1) distribute the proceeds of any unlawful activity; or (2) commit any crime of violence to further any unlawful activity." 18 U.S.C. § 1952(a) (1961). The statute provided that "as used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion or bribery in violation of the laws of the State in which committed or of the United States." *Id.* § 1952(b).

In 1984, as part of the Comprehensive Crime Control Act, Congress amended the Travel Act to include the offense of murder-for-hire. Congress added to the statute § 1952A, whose language was nearly identical to that of the current § 1958.

Section 1952A, as originally enacted, provided:

> (a) Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or uses or causes another (including the intended victim) to use the mail or any facility in interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, shall be fined . . . .
>
> (b) As used in this section and section 1952B
>
> (1) "anything of pecuniary value" means anything of value in the form of money, a negotiable instrument, a commercial interest, or anything else the primary significance of which is economic advantage; and
>
> (2) "facility of interstate commerce" includes means of transportation and communication.

18 U.S.C. § 1952A (1984).

Several years later, as part of the Anti-Drug Abuse Act of 1988, Congress removed § 1952A from the Travel Act, reenacting it in virtually identical terms as a separate statute, 18 U.S.C. § 1958. Since 1988, Congress has made several slight modifications to § 1958, but the statute before the Court today is substantively the same as the one Congress originally appended to the Travel Act in 1984 and recast in 1988 as § 1958.

The district court sentenced Drury to 204 months' imprisonment. He timely appealed to this Court.

C.

This panel initially affirmed Drury's convictions. *United States v. Drury*, 344 F.3d 1089 (11th Cir. 2003). By a divided vote, the panel held that § 1958(a) creates federal jurisdiction only when a murder-for-hire scheme *uses in interstate commerce* a facility such as the telephone. *Id.* at 1104. Accordingly, the panel concluded that the district court erred in instructing the jury that pay phones and cellular phones are *per se* facilities in interstate commerce, but it found this error to be harmless, in light of the evidence that the cellular phone signal actually traveled from Georgia into Florida, before bouncing back into Georgia, each time Drury called Agent Valoze. *Id.* at 1106. The interstate path of the phone signals, the panel held, constituted sufficient evidence to satisfy § 1958(a)'s jurisdictional nexus, and thus to support Drury's conviction. *Id.* at 1104-05. The panel also unanimously held that the district court committed no reversible error in prohibiting Drury from introducing evidence of his character for truthfulness, *id.* at 1110; in refusing to admit testimony from Drury's son regarding a prior consistent statement made by Drury after his arrest, *id.* at 1108-09; or in denying Drury's request for certain jury instructions regarding witness credibility and law enforcement investigative techniques, *id.* at 1109-10.

On February 3, 2004, this Court vacated the panel opinion and directed that the case be heard *en banc*. *United States v. Drury*, 358 F.3d 1280 (11th Cir. 2004) (*en banc*). We granted rehearing *en banc* to consider the important question of whether a purely intrastate use of a facility of interstate

commerce (the telephone) satisfies the jurisdictional requirement of § 1958(a).

Notably, after the grant of *en banc* rehearing, Congress amended § 1958 to resolve precisely that question, which had been the subject of some interpretive disagreement among the courts of appeals. The Sixth Circuit, in *United States v. Weathers*, 169 F.3d 336 (6th Cir. 1999), interpreted the phrase "[w]hoever . . . uses . . . any facility in interstate. . . commerce" as requiring that the relevant facility actually be *used* in interstate commerce.[2] In contrast, the Fifth Circuit, in *United States v. Marek*, 238 F.3d 310 (5th Cir. 2001), interpreted that language as covering any use -- intra- or interstate -- of an interstate commerce facility. The Seventh Circuit, in *United States v. Richeson*, 338 F.3d 653 (7th Cir. 2003), similarly read § 1958's jurisdictional language as "requir[ing] that the facility, and not its use, be in interstate or foreign commerce." *Id.* at 660.

The principal source of the courts' interpretive difficulty with § 1958 seemed to be the mismatch between the jurisdictional section's use of the phrase "facility in interstate . . . commerce," see § 1958(a), and the definitional section's use of the similar but not identical phrase "facility of interstate commerce," *see* § 1958(b)(2) (providing that "'facility of interstate commerce' includes means of transportation and communication"), coupled with the possibility of reading "in interstate. . . commerce" as

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[2] It bears noting, however, that the Sixth Circuit subsequently disavowed the reasoning of *Weathers* and limited its holding to the facts of that case, adopting instead the Fifth Circuit's construction of the statute in *Marek*. *See United States v. Cope*, 312 F.3d 757, [illegible] (6th Cir. 2002).

modifying the immediately preceding noun "facility" or the more remote verb "uses." *See, e.g., Weathers*, 169 F.3d at 340; *Marek*, 238 F.3d at 313.

In the time since these cases were decided, and since this panel issued its original opinion in this case, Congress has amended § 1958 to eliminate precisely these problems, making the statute's jurisdictional reach crystal clear. As part of the Intelligence Reform and Terrorism Prevention Act of 2004, which passed the House of Representatives December 7 and the Senate December 8, and was signed into law by the President on December 17, Congress amended 18 U.S.C. § 1958 to change the phrase "facility in" to "facility of." The amendment provides:

Section 1958 of title 18, United States Code, is amended-

(1) in subsection (a), by striking "facility in" and inserting "facility of"; and

(2) in subsection (b)(2), by inserting "or foreign" after "interstate".

Intelligence Reform and Terrorism Prevention Act of 2004, § 6704, Pub. L. No. 108-458, 118 Stat. 3638.

Thus, the new version of § 1958 reads, "Whoever . . . uses . . . any facility of interstate or foreign commerce . . . ." This amendment makes absolutely clear that § 1958 establishes federal jurisdiction whenever any "facility of interstate commerce" is used in the commission of a murder-for-hire offense, regardless of whether the use is interstate in nature (*i.e.* the telephone call was between states) or purely intrastate in nature (*i.e.* the telephone call was made to another telephone within the same state).

Because this amendment obviates for all future convictions under § 1958 the precise question of statutory construction that we granted rehearing *en banc* to resolve, we determined that the case no longer merited *en banc* consideration. The full Court thus vacated the order granting rehearing en banc, and referred the case back to this panel for further consideration. *United States v. Drury*, 358 F.3d 1280 (11th Cir. 2004).

The opinion we issue today addresses Drury's challenges to his conviction under the previous version of § 1958 without resolving any broader question of statutory construction, since Drury's own conviction stands under either of the competing interpretations of § 1958(a). On reconsideration, we once again find that the uncontroverted evidence that Drury, in arranging for the murder of his wife, used a telephone on four separate occasions to place calls that actually crossed an interstate border, is sufficient to support his conviction regardless of how we read § 1958(a)'s jurisdictional language. In addition, we again conclude that the district court committed no reversible error in its evidentiary rulings or its instructions to the jury. We therefore AFFIRM Drury's convictions.

II.

A.

Drury first argues that the government offered insufficient evidence at trial to establish the he *used* a facility *in interstate commerce*, as he alleges is required by § 1958(a). Drury does not dispute the government's expert testimony that each of the four calls he placed to Agent Valoze's cellular phone was routed from Georgia through VoiceStream's Jacksonville,

Florida switching center, and then back into Georgia,[3] but he nevertheless contends that these interstate contacts do not satisfy § 1958(a)'s jurisdictional requirement.

The government argues that § 1958(a) requires only proof that Drury used a facility that, based on its interstate capabilities rather than actual interstate use, qualifies inherently as a "facility in interstate commerce." Alternatively, the government contends that even if the statute requires that a facility actually be used in interstate commerce, the routing of Drury's calls from Georgia through Florida fully satisfies this requirement.

Whether there is sufficient evidence to support a conviction is a question of law, which we review *de novo*. *United States v. Tarkoff*, 242 F.3d 991, 993 (11th Cir. 2001). "We will affirm a jury's verdict if a reasonable trier of fact could conclude that the evidence establishes guilt beyond a reasonable doubt. In determining a sufficiency of the evidence claim, we view the evidence in the light most favorable to the government, with all reasonable inferences and credibility choices made in the government's favor." *United States v. Miles*, 290 F.3d 1341, 1355 (11th Cir. 2002) (citation omitted).

In evaluating Drury's sufficiency of the evidence claim, we do not decide whether § 1958(a) actually *requires* that a

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[3] Drury does, however, mistakenly refer to the telephone signal as a radio signal. This is incorrect. Prior to reaching the cellular tower closest to the target user's cellular phone, a telephone signal sent from a land line travels entirely through terrestrial means. It is only after that call has been switched by the cellular provider to the cellular tower closest to the target subscriber that the signal passes via radio signals

facility be used in interstate commerce, since it suffices here to observe that uncontroverted evidence establishes that the relevant facility (the telephone) *was* so used. Drury argues that the interstate routing of the four telephone calls he placed from Georgia pay phones to Agent Valoze's Georgia cellular phone is inadequate to establish that he used the telephone in interstate commerce, since a "signal sent unintentionally and inadvertently across state lines" is a "tenuous and insufficient" contact. This argument is unpersuasive.

Drury points to nothing in the statute, and we can find nothing that suggests the telephone's use in interstate commerce must be knowing or intentional. We see no reason that unintentional use in interstate commerce would not qualify as use in interstate commerce, and this Circuit's precedent suggests that there is none. In *United States v. Davila*, 592 F.2d 1261 (5th Cir. 1979),[4] the former Fifth Circuit held that the "purely incidental" interstate routing of a Western Union wire transfer satisfied the interstate commerce requirement of the federal wire fraud statute, 18 U.S.C. § 1343. In *Davila*, funds transferred between two banks located in the state of Texas were, unbeknownst to the defendant, routed through the state of Virginia. In spite of the fact that the interstate routing was wholly incidental to the wire fraud offenses with which the defendant was charged, the Court rejected the defendant's argument that the interstate nexus was "too minimal and incidental" to satisfy the statute's jurisdictional element, reasoning that the wire transfers "were essential" to carrying out the offenses charged, "and they went of necessity on interstate facilities." *Id.* at 1264.

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[4] The Eleventh Circuit has adopted as precedent the decisions of the former Fifth Circuit rendered prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981).

The interstate routing of Drury's willful calls to Agent Valoze was similarly necessary for their completion, and the calls themselves were essential in facilitating the murder-for-hire plot. The calls were not accidentally or incidentally placed, but rather were made knowingly to further a scheme to commit murder-for-hire. Accordingly, whether Drury knew or intended that they would travel across state lines is immaterial. This situation is no different than if Agent Valoze had himself been located in Florida when he received Drury's calls to his cellular phone -- Drury might not have had any intention of placing an out-of-state call, but undoubtedly he would have done so.

That Drury did *in fact* use the telephone *in interstate commerce* to facilitate murder-for-hire fully establishes the jurisdictional element of § 1958(a). We, therefore, conclude that the government presented sufficient evidence at trial for a reasonable jury to have "found the essential elements of the crime beyond a reasonable doubt," *Tarkoff*, 242 F.3d at 993, and we reject Drury's sufficiency of the evidence claim.

B.

Drury next argues that, regardless of whether the government presented sufficient evidence to establish the requisite jurisdictional nexus, the district court erred in instructing the jury that "pay telephones and cellular telephones are 'facilities in interstate commerce' under federal law." This instruction, Drury contends, violated his right to have a jury decide whether he "is guilty of every element of the crime with which he is charged, beyond a reasonable doubt," *United States v. Gaudin*, 515 U.S. 506, 510, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995) (citation omitted), by removing from the jury's consideration an essential element of a § 1958 violation: the interstate nexus.

The propriety of the trial court's jury instruction is a question of law, which we review *de novo*. *United States v. Leonard*, 138 F.3d 906, 908 (11th Cir. 1998).

The jurisdictional requirement of § 1958(a) is a substantive element of the offense of murder-for-hire. *See United States v. Tinoco*, 304 F.3d 1088, 1105 (11th Cir. 2002) (observing that the identically worded jurisdictional requirement of § 1958's predecessor statute, the Travel Act, "is a substantive element of Travel Act offenses that must be decided by a jury"). Drury, therefore, has a constitutional right to have a jury determine whether the requirement is satisfied. *See Gaudin*, 515 U.S. at 522-23 ("The Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged."); *id.* at 513 (observing that there is a "historical and constitutionally guaranteed right of criminal defendants to demand that the jury decide guilt or innocence on every issue, which includes application of the law to the facts").

However, we need not decide whether the trial judge's instruction that telephones are "facilities in interstate commerce" violated Drury's right to a jury determination of every element of the charged offense, since the instructions are subject to harmless error review. As the Supreme Court observed in *Chapman v. California*, 386 U.S. 18, 22, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." Plainly, a jury instruction that omits an element of the charged offense -- the error Drury alleges here -- is subject to harmless error analysis. *See Neder v. United States*, 527 U.S. 1, 9, 119 S.

Ct. 1827, 144 L. Ed. 2d 35 (1999) ("[A]n instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence."); *Ross v. United States*, 289 F.3d 677, 681 (11th Cir. 2002). The appropriate inquiry is "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Neder*, 527 U.S. at 15 (quoting *Chapman*, 386 U.S. at 24).

Here, it is clear beyond reasonable doubt that instructing the jury that telephones are "facilities in commerce" did not contribute to their rendering of a guilty verdict. At trial, the government presented clear and uncontradicted evidence that all four telephone calls Drury placed to Agent Valoze traveled from Georgia into Florida, and then back into Georgia. Drury did not dispute this evidence at trial, nor does he challenge it on appeal. Since the factual foundation for the jurisdictional component of § 1958(a) is uncontested, we cannot conclude that Drury's constitutional rights were impaired by the challenged jury instruction, even if it was improperly given. We have no reasonable doubt that the jury would have reached the same result with or without that instruction, and thus conclude that even if the district court's instruction on § 1958(a)'s jurisdictional element was erroneous, any such error was harmless.

C.

Drury next challenges the district court's exclusion of evidence of his truthful character. Drury claims that the government attacked his credibility at trial, entitling him to introduce rehabilitative evidence pursuant to Federal Rule of Evidence 608(a)(2). Rule 608(a)(2) provides that "evidence of truthful character is admissible only after the character of the

witness for truthfulness has been attacked by opinion or reputation evidence or otherwise."

Drury does not suggest that the government presented any opinion or reputation evidence about his character, but argues that his character was "otherwise" attacked. He offers as the basis for this contention a series of scattered questions asked by the prosecutor during cross-examination of Drury.[5] Among the examples of what Drury cites as the prosecution's "credibility-laden questions" are these: "Are you telling us that you told an arresting officer that you wanted to make a statement and he wouldn't let you?"; "Are you saying that he hushed you up?"; "Is that what you want this jury to believe?"; "You don't think the officer had any reason to think that you were trying to offer him a bribe?"; and "Is that what you are telling us?" Based on these and several other remarks of similar tenor, Drury sought to introduce testimony from six witnesses prepared to attest to his truthful character.

We review a trial court's evidentiary rulings for a clear abuse of discretion. *Tinoco*, 304 F.3d at 1119. "The application of an abuse-of-discretion review recognizes the range of possible conclusions the trial judge may reach." *United States v. Frazier*, 387 F.3d 1244, 1259 (11th Cir.

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[5] Drury also contends that the government displayed its intention to attack his character during a sidebar conference with the trial judge, when the prosecutor stated: "This is not a collateral material, he has made character an issue in his defense." Drury takes this statement entirely out of context. In reality, the quoted statement was referring not to Drury's "character for truthfulness," but to the "character of the relationship" between himself and Whatley, as is made clear from the prosecutor's immediately preceding statement, that "this defendant has made it a linchpin of his defense that his relationship with Mr. Whatley was of a particular character."

2004) (*en banc*). "By definition . . . under the abuse of discretion standard of review there will be occasions in which we affirm the district court even though we would have gone the other way had it been our call. That is how an abuse of discretion standard differs from a de novo standard of review. As we have stated previously, the abuse of discretion standard allows 'a range of choice for the district court, so long as that choice does not constitute a clear error of judgment.'" *Id.* (quoting *Rasbury v. I.R.S.* (*In re Rasbury*), 24 F.3d 159, 168 (11th Cir. 1994) (citations and internal quotation marks omitted); *see also Kern v. TXO Prod. Corp.*, 738 F.2d 968, 971 (8th Cir. 1984) ("The very concept of discretion presupposes a zone of choice within which the trial courts may go either way."). "Thus, when employing an abuse-of-discretion standard, we must affirm unless we find that the district court has made a clear error of judgment, or has applied the wrong legal standard." *Id.*

Evidentiary errors "do not constitute grounds for reversal unless there is a reasonable likelihood that they affected the defendant's substantial rights; where an error had no substantial influence on the outcome, and sufficient evidence uninfected by error supports the verdict, reversal is not warranted." *United States v. Hawkins*, 905 F.2d 1489, 1493 (11th Cir. 1990). "The trial judge is given broad discretion in ruling on the admissibility of character testimony." *United States v. Solomon*, 686 F.2d 863, 874 (11th Cir. 1982).

After careful review of the pertinent exchanges between the government's counsel and Drury, we conclude that the district court did not abuse its discretion in excluding the proffered testimony. As we have previously observed, under Federal Rule of Evidence 608(a)(2), "evidence of a witness' truthful character is admissible only after [his] character for truthfulness has been attacked." *United States v. Hilton*, 772

F.2d 783, 786 (11th Cir. 1985). An "attack" that consists only of "Government counsel pointing out inconsistencies in testimony and arguing that the accused's testimony is not credible does not constitute an attack on the accused's reputation for truthfulness within the meaning of Rule 608." *United States v. Danehy*, 680 F.2d 1311, 1314 (11th Cir. 1982). However, that is precisely the sort of "attack" Drury claims the prosecution to have launched during its cross-examination. Because such an attack is insufficient to authorize rehabilitation under Rule 608, we have little trouble concluding that the district court did not abuse its discretion in excluding Drury's proffered reputation-for-truthfulness testimony.

D.

Drury's next challenge is to the trial court's exclusion of testimony concerning a prior consistent statement Drury allegedly made to his son, Don. Drury's son would have testified that Drury told him immediately after his arrest that he had been participating in a role-playing exercise with Agent Valoze. Drury argues that his son's testimony was admissible on two grounds. First, he claims it was admissible to rehabilitate his credibility, which he says the prosecution impeached on cross-examination by insinuating that he had fabricated the role-playing story. Specifically, Drury cites the question, "Is that where you got the idea to claim that you believed this was all role playing?" as a prosecutorial attack on his credibility. Second, Drury argues that his son's testimony is admissible under Federal Rule of Evidence 801(d)(1)(B), as a prior statement "consistent with the declarant's testimony and . . . offered to rebut an express or implied charge against the declarant of recent fabrication or

improper influence or motive." Fed. R. Evid. 801(d)(1)(B). Both arguments are unavailing.[6]

As to Drury's first argument, we find again that his credibility was not attacked. Drury argues that "[a] prior consistent statement may be used for rehabilitation when the statement has a probative force bearing on credibility beyond merely showing repetition." *United States v. Pierre*, 781 F.2d 329, 333 (2d Cir. 1986). This may well be true, but it does not change the fact that Federal Rule of Evidence 608 permits rehabilitative evidence only when a witness's reputation for truthfulness has actually been attacked. *See* Fed. R. Evid. 608(a)(2). As we observed previously, the prosecution's questioning the veracity of the accused's testimony and calling attention to inconsistencies therein does not constitute an attack on the accused's reputation for truthfulness permitting rehabilitative testimony. *See Danehy*, 680 F.2d at 1314. Again, Drury has pointed to nothing but a few cross-examination questions to support his claim that the prosecution attacked his character for truthfulness.

Moreover, and perhaps more significant, prior consistent statements are treated as admissible non-hearsay *only* if they

---

[6] Drury makes the additional claim that the trial court improperly ruled that Federal Rule of Evidence 613 barred Don Drury's testimony. However, Drury has taken the trial court's reference to Rule 613 completely out of context. Rule 613(b) governs admissibility of prior *in*consistent statements, *see* Fed. R. Evid. 613(b), and accordingly the trial court applied it in determining the admissibility of alleged prior inconsistent statements by Mr. Whatley, who served as a trial witness. The trial court did not, however, cite Rule 613 as a ground for excluding Don Drury's testimony, and thus we do not address Appellant Drury's argument that the trial court erroneously applied that rule.

are offered to rebut a specific allegation of recent fabrication, not to rehabilitate credibility that has been generally called into question. *See Tome v. United States*, 513 U.S. 150, 157, 115 S. Ct. 696, 130 L. Ed. 2d 574 (1995) ("The Rules do not accord this weighty, nonhearsay status to all prior consistent statements. To the contrary, admissibility under the Rules is confined to those statements offered to rebut a charge of 'recent fabrication or improper influence or motive' . . . ." (quoting Fed. R. Evid. 801(d)(1)(B)). The Supreme Court has made perfectly clear that "prior consistent statements may not be admitted to counter all forms of impeachment or to bolster the witness merely because she has been discredited." *Id.* Accordingly, the trial court did not abuse its discretion in ruling Don Drury's testimony inadmissible to rehabilitate Appellant Drury's credibility.

As to Drury's second argument, we find that the trial court committed no abuse of discretion in declining to admit Don Drury's testimony as a prior consistent statement. "A district court is granted broad discretion in determining the admissibility of a prior consistent statement under Fed. R. Evid. 801(d)(1)(B) and will not be reversed absent a clear showing of abuse of discretion." *United States v. Prieto*, 232 F.3d 816, 819 (11th Cir. 2000). Of particular importance here, "whether a witness had a motive to fabricate when a prior consistent statement was made is a factual question properly decided by the district court and subject to reversal only for a clear abuse of discretion." *Id.* at 822.

A prior consistent statement is admissible only if it was "made before the alleged influence, or motive to fabricate, arose." *Tome*, 513 U.S. at 158. Drury, however, claims that the district court abused its discretion by applying a "temporal nexus test," under which the fact that Drury's statement to Don was made post-arrest rendered it inadmissible, on the

theory that his arrest gave Drury a motive to fabricate. In *United States v. Prieto*, this Court declined to adopt a "bright line rule that motive to fabricate necessarily and automatically attaches upon arrest." *Prieto*, 232 F.3d at 822. However, the record does not show that the trial court applied such a rule in this case. In fact, the trial judge excluded the statement because he found that "the conditions established by [*United States v. Tome*] of admissibility of such a statement have not been established here." Although more specific findings on this subject would have eased our inquiry, the record provides ample support for the trial court's determination that Drury, subsequent to his arrest, had motive and opportunity to fabricate the story he told his son. Accordingly, we hold that the trial court did not abuse its discretion in ruling the statement inadmissible.

E.

Drury's final challenge is to the trial court's refusal to give his two requested jury instructions. The first proposed instruction, concerning government investigations, read:

> I instruct you that you may consider such evidence, including improper investigative techniques, in evaluating the credibility of the government witnesses. In other words, an investigation that is thorough and conducted in good faith may lead to more credible evidence than an investigation that is incomplete, negligent, or conducted in bad faith. In deciding the credibility of law enforcement witnesses, you may consider whether the investigation was conducted according to proper protocol and was complete.
>
> I further instruct you that if the government improperly, or inadequately investigated one aspect of

> this case, you may infer that the government inadequately, or improperly investigated other aspects of the case, as well. Based on this inference alone, you may disbelieve certain government witnesses.

Drury's second proposed jury instruction was Eleventh Circuit Pattern Jury Instruction (Criminal Cases), Basic Instruction 6.7, at 30 (West 1997), which reads:

> There may also be evidence tending to show that a witness has a bad reputation for truthfulness in the community where the witness resides, or has recently resided; or that others have an unfavorable opinion of the truthfulness of the witness. You may consider those matters also in deciding whether to believe or disbelieve such witness.

The district court did not give either instruction. Instead, as part of its preliminary instructions prior to opening statements, the district court instructed the jury:

> [Y]ou are the only people who can determine the credibility or the believability of the witnesses. You are the sole judges of the credibility of the witnesses and the weight to be accorded to the testimony and the evidence . . . . What you are going to see is that in determining the credibility of the witnesses you will use the same criteria that you use in your daily life. The same things that you use to determine the credibility or the believability of the witnesses, are exactly the same sorts of things that you use in your daily lives when you are trying to decide whether or not you can believe somebody about a very important matter.

At the close of trial, the judge further instructed the jury:

> In deciding whether you believe or do not believe any witness, I suggest that you ask yourself a few questions: Did the witness impress you as one who was telling the truth? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to observe accurately the things he or she testified about? Did the witness appear to understand the questions clearly and answer them directly? Did the witness's testimony differ from other testimony or other evidence?

"Our review of a trial court's jury instructions is limited; if the instructions accurately reflect the law, the trial judge is given wide discretion as to the style and wording employed in the instruction. Under this standard, 'we examine whether the jury charges, considered as a whole, sufficiently instructed the jury so that the jurors understood the issues and were not misled.'" *United States v. Fulford*, 267 F.3d 1241, 1245 (11th Cir. 2001) (citation omitted) (quoting *Carter v. DecisionOne Corp.*, 122 F.3d 997, 1005 (11th Cir. 1997) (citation and internal quotation marks omitted)); *see also United States v. Gold*, 743 F.2d 800, 819 (11th Cir. 1984) ("The district court has broad discretion in formulating its charge so long as the charge accurately reflects the law and the facts."). "The district court's refusal to give the requested instruction is reversible only if (1) the instruction is substantially correct, (2) the instruction was not addressed in the charge actually given, and (3) the failure to give the requested instruction seriously impaired the defendant's ability to present an effective defense." *United States v. De La Mata*, 266 F.3d 1275, 1298 (11th Cir. 2001).

We find no error in the district court's decision not to give Drury's requested instructions. Drury's proffered non-pattern jury charge was superfluous, since the trial court's general instructions on evaluating evidence and witness credibility were sufficient to guide the jury in its deliberations. Accordingly, the trial court's failure to give Drury's proposed instruction on the reliability of government investigations did not seriously impair his ability to present an effective defense, and thus we can find no abuse of discretion.

Nor did the district court abuse its discretion in declining to give Eleventh Circuit Pattern Jury Instruction 6.7. Applying the three-part reversibility analysis outlined above, we conclude that this charge is clearly "substantially correct" under the first prong. As to the second prong, whether the charge the trial court gave covered the same territory as the pattern instruction Drury requested is a closer question. The requested instruction refers specifically to a witness' "reputation for truthfulness in the community," whereas the one actually given covers only witness credibility in more general terms. However, even if we found the content of the proposed instruction inadequately addressed in the actual instruction, satisfying the second prong of the analysis, Drury's assignment of error nevertheless fails under the third prong. Drury has shown no substantial impediment to his ability to present an effective defense as a result of the trial court's failure to give the pattern instruction, and we perceive none.

Drury argues that he needed that instruction because Whatley, the witness Drury characterizes as the crux of the government's case, was shown at trial to have a bad reputation for truthfulness in the community. Indeed, the trial court permitted Drury to vigorously argue as much to the jury, through direct examination of two character witnesses,

cross-examination of Whatley, and closing argument. These opportunities to impugn Whatley's character for truthfulness, coupled with the trial court's general instructions on witness credibility, persuade us that the trial court did not abuse its discretion in declining to give Drury's proposed pattern jury charge. *Cf. United States v. Ryan*, 289 F.3d 1339, 1345 (11th Cir. 2002) ("In light of the opportunities afforded the jury to consider Ryan's entrapment defense, we find that the failure to include specific instructions on the issue did not seriously impair presentation of the defense."); *United States v. Chirinos*, 112 F.3d 1089, 1101 (11th Cir. 1997) (holding that failure to instruct did not impair a defendant's ability to argue that he did not intend to steal cocaine as charged, but rather money, in light of the defendant's opportunities to elicit supporting testimony and to make closing arguments on the issue).

III.

Based on the foregoing analysis, we AFFIRM Drury's murder-for-hire conviction under 18 U.S.C. § 1958, and his conviction for possession of a firearm in connection with a crime of violence under 18 U.S.C. § 924(c).

AFFIRMED.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 02-12924-HH
[Filed: September 7, 2004]

UNITED STATES OF AMERICA	)
Appellee,	)
	)
v.	)
	)
CARL M. DRURY, JR.,	)
Appellant.	)
	)

On Appeal from the United States, District Court
Southern District of Georgia

MOTION FOR REMAND
FOR RE-SENTENCING PURSUANT
TO BLAKELY V. WASHINGTON

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1 counsel for Appellant Drury, certifies that the following persons may have an interest in the outcome of this case:

Alaimo, Honorable Anthony A., United States District Court Judge, Southern District of Georgia

Booth, Edmund A., Jr., First Assistant U.S. Attorney, Southern District of Georgia

Bowen, Jr., Honorable Dudley H., United States District Court Judge, Southern District of Georgia

Bubsey, William E., Prior Appellate Counsel

Copeland, Amy Lee, Assistant United States Attorney, Lead Government Appellate Counsel

Drury, Jr., Carl M., Appellant (presently incarcerated)

Drury, Mary Adams

Garland, Edward T.M., Trial Counsel

Gillen, Parker & Withers, LLC

Jenkins, James K., Appellate Counsel for Appellant

Kramer, Frederick, W., III, Trial Counsel for Government

Maloy & Jenkins

McCord, Bubsey & Ketchum

McCullough, Darrin, Assistant United States Attorney Trial Counsel for Government

Murphy, Paul, United States Attorney

Samuel, Donald F., Trial Counsel for Appellant

Thompson, Richard S., Former U.S. Attorney

Withers, Thomas A., Trial Counsel for Appellant and Appellate Counsel

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Appeal No.: 02-12924-HH

UNITED STATES OF AMERICA,	)
Appellee,	)
	)
v.	)
	)
CARL M. DRURY, JR.,	)
Appellant.	)
	)

MOTION FOR REMAND FOR RE-SENTENCING PURSUANT TO BLAKELY V. WASHINGTON

GROUNDS FOR MOTION AND RELIEF SOUGHT

COMES NOW, CARL M. DRURY, JR., Appellant herein, and files this his Motion for Remand for Re-Sentencing pursuant to *Blakely v. Washington* and shows this Court the following:

In sentencing Drury, the district court made factual determinations upon which it based Guidelines enhancements, resulting in an increase in Drury's sentence. Specifically, the district court enhanced Drury's sentence pursuant to U.S.S.G. § 3C1.1 based on a factual finding by the court that Drury purportedly testified falsely at trial (PSR ¶ 35).

ARGUMENT AND CITATION OF AUTHORITY

On June 24, 2004, after briefing, oral argument, and submission of this case which is currently pending before this

Court *en banc*, the Supreme Court announced its decision in *Blakely v. Washington*, 124 S. Ct. 2531 (2004). The Supreme Court held that the imposition of a sentence in excess of the statutory maximum violates the Sixth Amendment unless a jury finds beyond a reasonable doubt the facts on which the increased sentence rests. *Id.* at 2537. Under *Blakely*, the statutory maximum sentence is "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Id.* Drury submits that his sentence is invalid under *Blakely*, and this Court should vacate his sentence and remand for re-sentencing.

In the wake *of Blakely*, at least two Circuit Courts of Appeals have held that there is no distinction between the Washington statute at issue in *Blakely* and the United States Sentencing Guidelines, and that the Guidelines are therefore unconstitutional. *United States v. Booker*, --- F.3d ----,2004 WL 1535858, *2 (7th Cir., Jul. 09, 2004); *United States v. Ameline*, --- F.3d ----, 2004 WL 1635808 (9th Cir., Jul. 21, 2004). Other courts have seriously questioned the continuing validity of the Guidelines. *See United States v. Pineiro*,--- F.3d ----,2004 WL 1543170, *6 & *9 (5th Cir., Jul. 12, 2004) (holding that the statutory maximum, for the purposes of *Blakely*, are those set forth in the United States Code); *United States v. Penaranda*,--- F.3d ----,2004 WL 1551369, *1 & *4 (2nd Cir., Jul. 12, 2004) (certifying three question to the Supreme Court for review relating to whether the Sixth Amendment prohibits a sentencing judge from finding facts forming the basis for determining the applicable adjusted offense level under the Federal Guidelines, which are not contained in the jury's verdict or admitted by the defendant).

Drury, of course, acknowledges that this Circuit has held that a *Blakely* claim raised for the first time on appeal is untimely. See *United States v. Levy,* 2004 WL 1725406 (1 lth Cir. August 3, 2004); *United States v. Curtis,* 2004 WL 1774785 (1 lth Cir. August 10, 2004). Drury did not previously raise this issue because this Court's precedent plainly precluded such a challenge. *United States v. Sanchez,* 269 F. 3d. 1250, 1262-63 (11th Cir. 2001) *(en banc),* and *Blakely* establishes a new line authority which entitles Drury to relief, which was not previously available.

Drury's *Blakely* challenge should be granted under the plain error standard set out in *United States v. Richardson,* 304 F. 3d. 1061, 1064 (1 yh Cir. 2002). Drury submits that: (1) under *Blakely,* his sentence was unconstitutionally imposed; (2) this error is plain under a straight-forward reading of the unambiguous basis for the holding in *Blakely;*[1] (3) this error affected Drury's substantial rights resulting in a sentence significantly longer than the sentence without the previously described enhancement[2]; and (4) this error severely affected the fairness, integrity and public reputation of judicial

---

[1] Drury acknowledges that this Court recently held that since neither this Circuit, not the Supreme Court, has resolved the issue of whether *Blakely* applies to the Sentencing Guidelines, the error is not "plain" or "obvious". *United States v. Duncan,* 2004 WL 1838020 (11th Cir., August 18, 2004).

[2] Drury also contends that when the wrong fact-finder finds facts which result in a sentence longer than would otherwise apply, and that determination is made under the wrong standard of proof, there is a structural error as in *Sullivan v. Louisiana,* 508 U.S. 275,281-82, 113 S. Ct. 2078 (1993), which satisfies the third prong of plain error analysis without any further showing.

proceedings by allowing judges to usurp the role of the jury. See *United States v. Pirani*, 2004 WL 1748930 (8th Cir. August 5, 2004), *vacated for rehearing en banc* (8th Cir. Aug. 16, 2004), (reversing defendant's sentence under plain error analysis and remanding for re-sentencing consistent with *Blakely*).

The Supreme Court has granted certiorari in two cases to address the application of *Blakely* to the Sentencing Guidelines. *United States v. Booker*, No. 04-104 and *United States v. Fanfan*, No. 04-105, 2004 WL 1713655 (August 2, 2004). These cases will be argued October 4, 2004. Drury submits that considerations of judicial economy weigh heavily against disposing of Blakely challenges in cases pending on direct appeal until the Supreme Court speaks in *Booker* and *Fanfan*. Therefore, Drury respectfully requests that as an alternative to remanding his case for re-sentencing, this Court hold its decision on rehearing en banc in this matter until the Supreme Court acts.

WHEREFORE, Drury respectfully requests that this Court remand this matter for re- sentencing.

This the ___ day of September, 2004.

GILLEN, PARKER & WITHERS, LLC

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APPENDIX F

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 02-12924-HH
[Filed: January 18, 2005]

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)
versus	)
CARL M. DRURY, JR., M.D., Doctor, Defendant-Appellant.	)

Appeal from the United States District Court for the Southern District of Georgia

ORDER

Appellant's motion to remand this appeal is DENIED based on his failure to challenge his sentence in the opening brief. *See United States v. Ardley*, 242 F.3d 989, 990 (11th Cir. 2001) (applying "well-established rule that issues and contentions not timely raised in the briefs are deemed abandoned"); *United States v. Nealy*, 232 F.3d 825, 830 (11th Cir. 2000) ("Defendant abandoned the [*Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)] indictment issue by not raising the issue in his initial

brief."); see also *United States v. Martinez*, 96 F.3d 473,475 (1 lth Cir. 1996) (refusing to consider issue raised for first time in petition for reheating); *Scott v. Singletary,* 38 F.3d 1547, 1552 n. 7 (1lth Cir. 1994) (same). Based on this Court's well-established rule that issues not raised in the initial brief are deemed abandoned, *Ardley,* 242 F.3d at 990, we must deny Drury's motion to remand.

/S/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

Case No. CR201-028

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CARL M. DRURY, JR.,
Defendant.

Brunswick, Georgia
May 15, 2001
2:00 p.m.

SENTENCING HEARING
BEFORE CHIEF JUDGE DUDLEY H. BOWEN, JR.
United States District Judge

[p.59]

one which, as Coach Inman says, has resulted in great contribution to the communities that the Defendant has served. Those people do not see, have not been made aware of the deception, the fanciful world in which another man

lives, a manipulative person, a person whose personality is frequently marked by bravado, big talk, and bluster.

The sentence imposed by this Court should ultimately be a reflection of an appropriate societal response to the criminal conduct committed by the Defendant, amply proven by the evidence in this case. There are a number of factors involved in criminal sentencing: punishment, deterrence, exclusion from society, and rehabilitation.

It is true that this Defendant has contributed to society, if not unselfishly at all times, at least efficiently on many occasions. It is true this Defendant has utilized instruments of commerce and communication to engage in this plot of murder for hire that was thwarted by Special Agent Valoze's effective undercover work.

And it is true that, in all respects, the federal law perceives this as a very serious crime. The guidelines are substantial, providing for at least one hundred, fifty-one months in prison for four of the counts, followed by sixty months consecutively.

I have endeavored throughout this presentation to [p. 60] divine in my own mind the appropriate level of societal response. Given all of the circumstances, considering all of the conduct of the actors, especially that of the Defendant, the statutory law under which Counts One through Four are rendered criminal conduct provides for a maximum prison term of ten years or one hundred, twenty months.

Under conventional sentencing concepts, a judge could, at least, consider the imposition of a sentence up to ten years in prison concurrently or consecutively, dependent on the judgment of the judicial officer. Under guideline sentencing,

the guidelines prescribe a minimum term of one hundred, fifty months, forcing a consecutive term.

And this is true notwithstanding the fact that all of the first four counts of the Indictment are part and parcel of the same transaction, the plot to kill Drury's wife. And effectively, it is really one call that delivered the final decision to go forward with the unlawful plan.

Now this Defendant has, in his allocution, engaged in a venomous soliloquy. As the Assistant United States Attorney McCullough said, it does not merit much of a response. Quite candidly, it's the sort of thing that, in the balance of the exercise of mature judgment, should be ignored by the Court. I have endeavored, further, to discover the true heartland of criminality in such cases. I daresay that the [p. 61] Congress that considered, initially, the imposition of criminal sanctions for the conduct that is proscribed in Counts One through Four did not envision this Defendant in this courtroom today.

Of course, criminal statutes are made to include all who would transgress the definition of the law. But the typical concept in the minds of the legislators who rendered this conduct criminal would be some sort of mob context, some effort to eradicate a witness or the testimony of a witness or some other scenario not identical to today.

Considering the origins of the case, considering all of the communications that occurred, including those which occurred prior to the advent of Special Agent Valoze in this case, I am not convinced that this case falls within the so-called heartland of criminality that is proscribed by the statutes which enable Counts One through Four.

And it is the balance of my judgment which I must satisfy. And to an extent I will depart from the sentencing range called for by the guidelines because it is my view that all of the facts of this case are not of a nature contemplated by the Sentencing Commission in the formulation of the guidelines. I am taking into account not only the criminal history or absence of actual criminal history of this Defendant, but also the successes and the contributions of this Defendant in his past. Further, it is important to [p. 62] note that while the facts of the case bore heavily and negatively upon the intended victim, she was actually never in real danger from the plot alleged in the Indictment. This Defendant is a dangerous person, but in the facts of this case, the BATF was well aware of his every move.

Despite the venom of the emotion of the day, it is my view that this Defendant has contributed, has been a producer, and should receive some benefit in recognition thereof. Of course, he is also facing a very significant and severe criminal penalty for conduct that is reprehensible, conduct that is venal, conduct that a jury considered and condemned.

I have made a rather more lengthy statement of my reasons for imposing the particular sentence in question than might normally be the case. However, the guideline range in this case does exceed twenty-four months, and I felt compelled to do so.

Having determined that there is no reason why judgment and sentence should not be imposed in this case, having afforded the Defendant and his lawyers an opportunity to be heard, having reviewed the Presentence Report and stated my findings and some additional findings relative to the report, having heard from the United States Attorney, it is now

ordered that Carl M. Drury, Jr. be committed to the custody of the Bureau of Prisons for the purpose of [p. 63] imprisonment for the term of one hundred, forty-four months as to Counts One through Four -- that is, one hundred, twenty months on Counts One and Two and twenty-four months *consecutively* on Three and Four. Three and Four are to be served concurrently. One and Two are to be served concurrently.

Thereafter, a sentence of sixty months with respect to Count Five is imposed consecutive to all of the sentences in Count One through Four.

Are you clear on that, Mr. Lyons?

THE PROBATION OFFICER: Yes, Your Honor, I am.

THE COURT: This does involve a departure from the sentencing range called for by the guidelines, and I have explained my reason therefor.

Upon release from imprisonment, this Defendant shall be placed on supervised release for a term of five years as to Count Five and three years as to each of Counts One through Four. All of these are to be served concurrently.

While on supervised release, this Defendant shall comply with the standard conditions of supervision adopted by this Court and the mandatory conditions required by federal law, including but not limited to urine testing, a prohibition against the possession of any firearm or dangerous weapon, and a prohibition against any violation of

Supreme Court, U.S.
FILED
JUN 24 2005
OFFICE OF THE CLERK

(1)

No. 04-1438

In the Supreme Court of the United States

CARL M. DRURY, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner is entitled to relief on his claim of sentencing error when he failed to challenge his sentence in his opening brief in the court of appeals.

2. Whether the evidence presented at petitioner's trial was sufficient to establish the interstate-commerce jurisdictional element of the federal murder-for-hire statute, 18 U.S.C. 1958.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 7
Conclusion 19

TABLE OF AUTHORITIES

Cases:

Adams-Arapahoe Joint Sch. Dist. No. 28-J v. *Continental Ins. Co.*, 891 F.2d 772 (10th Cir. 1989) 11

Appendi v. *New Jersey*, 530 U.S. 466 (2000) 10, 13

Ardley v. *United States*, 535 U.S. 979 (2002) 15

Becton Dickinson & Co. v. *C.R. Bard, Inc.*, 922 F.2d 792 (Fed. Cir. 1990) 11

Bickel v. *Korean Air Lines Co.*, 96 F.3d 151 (6th Cir. 1996), cert. denied, 519 U.S. 1093 (1997) 11

Blakely v. *Washington*, 124 S. Ct. 2531 (2004) 5

Cupp v. *Naughten*, 414 U.S. 141 (1973) 15

Dixon v. *United States*, No. 04-8932, 2005 WL 540062 (June 6, 2005) 16

Edwards v. *Arizona*, 451 U.S. 477 (1981) 9

Garcia v. *United States*, 534 U.S. 823 (2001) 16

Ghana v. *Holland*, 226 F.3d 175 (3d Cir. 2000) 11

Gramegna v. *Johnson*, 846 F.2d 675 (11th Cir. 1988) 12

Greenwood v. *FAA*, 28 F.3d 971 (9th Cir. 1994) 11

Griffith v. *Kentucky*, 479 U.S. 314 (1987) 7, 8

Cases—Continued: Page

Harper v. *Virginia Dep't of Taxation*, 509 U.S. 86 (1993) 9

Hembree v. *United States*, No. 04-1210, 2005 WL 575559 (June 13, 2005) 16

Holman v. *Indiana*, 211 F.3d 399 (7th Cir.), cert. denied, 531 U.S. 880 (2000) 11

Johnson v. *United States*, 520 U.S. 461 (1997) 9

Kost v. *Kozakiewicz*, 1 F.3d 176 (3d Cir. 1993) 11

Leer v. *Murphy*, 844 F.2d 628 (9th Cir. 1988) 12

Levy v. *United States*, No. 04-8942, 2005 WL 540692 (June 6, 2005) 16

Maryland Peoples Counsel v. *FERC*, 760 F.2d 318 (D.C. Cir. 1985) 11

McGinnis v. *Ingram Equip. Co.*, 918 F.2d 1491 (11th Cir. 1990) 13

Nealy v. *United States*, 534 U.S. 1023 (2001) 15

Ortega-Rodriguez v. *United States*, 507 U.S. 234 (1993) 14

Padilla-Reyes v. *United States*, 534 U.S. 913 (2001) 16

Phillips v. *United States*, 536 U.S. 961 (2002) 16

Playboy Enters., Inc. v. *Public Serv. Comm'n*, 906 F.2d 25 (1st Cir.), cert. denied, 498 U.S. 959 (1990) 11

Priddy v. *Edelman*, 883 F.2d 438 (6th Cir. 1989) 11

Shea v. *Louisiana*, 470 U.S. 51 (1985) 8, 9

Shopco Distrib. Co. v. *Commanding Gen. of Marine Corps Base*, 885 F.2d 167 (4th Cir. 1989) 11

Cases—Continued: Page

Sweat v. *City of Fort Smith*, 265 F.3d 692 (8th Cir. 2001) 11
Thomas v. *Arn*, 474 U.S. 140 (1985) 14, 15
Thompson v. *United States*, 535 U.S. 1114 (2002) 16
United States v. *Ameline*, 400 F.3d 646 (9th Cir. 2005) 13
United States v. *Ardley*, 273 F.3d 991 (11th Cir. 2001), cert. denied, 535 U.S. 979 (2002) 9, 13
United States v. *Booker*, 125 S. Ct. 738 (2005) 7, 10
United States v. *Crosby*, 397 F.3d 103 (2d Cir. 2005) 13
United States v. *Dockery*, 401 F.3d 1261 (11th Cir. 2005) 13
United States v. *Gaudin*, 515 U.S. 506 (1995) 9
United States v. *Hernandez-Gonzalez*, 405 F.3d 260 (5th Cir. 2005) 14
United States v. *Humphrey*, 287 F.3d 422 (6th Cir. 2002) 10
United States v. *Keys*, 133 F.3d 1282 (9th Cir.), cert. denied, 525 U.S. 891 (1998) 10
United States v. *Levy*:
379 F.3d 1241 (11th Cir. 2004), vacated and remanded, 125 S. Ct. 2542 (2005) 13
391 F.3d 1327 (11th Cir. 2004), vacated and remanded, No. 04-8942, 125 S. Ct. 2542 (2005) 12
United States v. *Lewis*, No. 04-10102, 2005 WL 1394949 (5th Cir. June 14, 2005) 14, 17
United States v. *Marek*, 238 F.3d 310 (5th Cir.), cert. denied, 534 U.S. 813 (2001) 11, 12, 17

Cases—Continued: Page

United States v. *Miranda*, 248 F.3d 434 (5th Cir. 2001), cert. denied, 534 U.S. 980 (2001) and 1086 (2002) 11, 12, 14

United States v. *Mosley*, No. 04-11189, 2005 WL 1317026 (11th Cir. June 2, 2005) 16

United States v. *Oliver*, 397 F.3d 369 (6th Cir. 2005) 13

United States v. *Outen*, 286 F.3d 622 (2d Cir. 2002) 10

United States v. *Paladino*, 401 F.3d 471 (7th Cir. 2005) 13

United States v. *Quiroz*, 22 F.3d 489 (2d Cir. 1994) 11, 12

United States v. *Richeson*, 338 F.3d 653 (7th Cir.), cert. denied, 540 U.S. 934 (2003) 17

United States v. *Rivera Pedin*, 861 F.2d 1522 (11th Cir. 1988) 12

United States v. *Senn*, 128 Fed. Appx. 96 (11th Cir. 2005) 16

United States v. *Taylor*, No. 03-10167, 2005 WL 1155245 (5th Cir. May 17, 2005) 14, 17

United States v. *Vazquez-Rivera*, 407 F.3d 476 (1st Cir. 2005) 14

United States v. *Washington*, 398 F.3d 306 (4th Cir. 2005) 13

United States v. *Weathers*, 169 F.3d 336 (6th Cir.), cert. denied, 528 U.S. 838 (1999) 17, 19

United States v. *Wheat*, 278 F.3d 722 (8th Cir. 2001), cert. denied, 537 U.S. 850 (2002) 10

Statutes, regulation and rules: Page

Act of Dec. 17, 2004, Pub. L. No. 108-458, Tit. VI, 118 Stat. 3638 (to be codified at 18 U.S.C. 1958(a)) 3

18 U.S.C. 924(c) 2, 3, 4

18 U.S.C. 1958 ..... 2, 3, 4, 6

18 U.S.C. 1958(a) 3, 4, 5, 6, 17, 18, 19

United States Sentencing Guidelines § 3C1.1 4

Fed. R. App. P.:

Rule 2 12

Rule 28(a)(9)(A) 10

Rule 47(a) 14

In the Supreme Court of the United States

No. 04-1438

CARL M. DRURY, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 68a-95a) is reported at 396 F.3d 1303. An earlier panel opinion (Pet. 1a-64a) is reported at 344 F.3d 1089. The opinion of the court of appeals vacating the original panel opinion and granting rehearing en banc (Pet. App. 65a) is reported at 358 F.3d 1280. The opinion of the court of appeals vacating the earlier grant of rehearing en banc and remanding the case to the panel (Pet. 66a-67a) is reported at 396 F.3d 1143.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 2005. The petition for a writ of certiorari

was filed on April 15, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Georgia, petitioner was convicted of four counts of violating the federal murder-for-hire statute, 18 U.S.C. 1958, and one count of possessing a firearm in connection with a crime of violence, in violation of 18 U.S.C. 924(c). He was sentenced to terms of 120 months of imprisonment on two of the Section 1958 counts (to run concurrently with each other); to terms of 24 months of imprisonment on the other two Section 1958 counts (to run concurrently with each other and consecutively to the terms on the first two Section 1958 counts); and to a consecutive term of 60 months of imprisonment on the Section 924(c) count, for a total sentence of 204 months of imprisonment. The court of appeals affirmed. Pet. App. 68a-95a.

1. Agent Steven Whatley of the Bureau of Alcohol, Tobacco, and Firearms (ATF) intermittently resided with petitioner during several months of 2001. During that period, petitioner frequently complained about his wife and ultimately asked Agent Whatley if he would kill her or find someone who would. Agent Whatley reported that conversation to his supervisor, and an undercover sting operation was arranged, with ATF Agent Louis Valoze playing the role of the putative assassin. Pet. App. 70a-71a.

During August 2001, petitioner placed four calls to Agent Valoze's cellular telephone to arrange the details of the murder. All four calls were made from pay phones in Brunswick, Georgia; the cellular telephone number had a Georgia area code; and both petitioner

and Agent Valoze were at all relevant times physically located in Georgia. On August 20, 2001, after the third cellular telephone call, petitioner met with Agent Valoze outside a restaurant in Darien, Georgia. During that meeting, petitioner gave Agent Valoze a .38 caliber handgun to commit the murder, along with $250 as payment for the crime. After the fourth cellular telephone call on August 24, 2001, in which petitioner gave Agent Valoze final instructions about the timing of the murder, ATF agents arrested petitioner. Pet. App. 71a-72a.

2. At the time of the events in question, the federal murder-for-hire statute established criminal penalties for use of "any facility in interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value." 18 U.S.C. 1958(a) (2000). The statute further provided that "'facility of interstate commerce' includes means of transportation and communication."[1] Petitioner was charged with four counts of violating Section 1958(a), one for each of the telephone calls he made to Valoze's cellular telephone. Petitioner was also charged with possessing a firearm in connection with a crime of violence, in violation of 18 U.S.C. 924(c).

At trial, the government presented evidence that the communication signal for each of the four telephone calls made by petitioner to Agent Valoze had been routed through a switching center in Jacksonville, Florida, before reaching Agent Valoze's cellular telephone in Geor-

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[1] In 2004, Congress amended 18 U.S.C. 1958(a) to change the phrase "facility in" to "facility of," so that the statute now forbids the use of "any facility of interstate or foreign commerce" for the proscribed purpose. See Pub. L. 108-458, Tit. VI, § 6704, 118 Stat. 3638.

gia. Pet. App. 72a. The district court instructed the jury that "pay telephones and cellular telephones are 'facilities in interstate commerce' under federal law." *Id.* at 83a. The jury found petitioner guilty on each of the five counts of the indictment.

Consistent with the presentence report, the district court determined that petitioner's Guidelines sentencing range for the Section 1958(a) offenses was 151-188 months of imprisonment. See Gov't C.A. Br. 2. That calculation included a two-level upward adjustment under Guidelines § 3C1.1 for obstruction of justice, based on petitioner's false testimony at trial. See Pet. App. 99a. The district court further concluded that a downward departure from the Guidelines range was appropriate and that petitioner should be sentenced to a total of 144 months of imprisonment on the Section 1958 counts. See *id.* at 107a-109a. Because petitioner's offenses had not resulted in death or personal injury, the statutory maximum penalty for each Section 1958 count was ten years of imprisonment. 18 U.S.C. 1958(a). The district court sentenced petitioner to concurrent terms of 120 months of imprisonment on Counts One and Two of the indictment, and to 24 months of imprisonment on Counts Three and Four, with the sentences on Counts Three and Four to run concurrently with each other but consecutively to the terms on Counts One and Two. See Pet. App. 109a. The court also sentenced petitioner to a consecutive term of 60 months of imprisonment for the Section 924(c) conviction. See *ibid.*

3. The court of appeals affirmed. See Pet. App. 68a-95a.

a. In its initial opinion (see Pet. App. 1a-64a), a panel of the court of appeals held that the version of 18 U.S.C. 1958(a) in effect at the time of petitioner's conduct (see

p. 3 & note 1, *supra*) required proof that the defendant "actually use[d] a facility in a manner that implicates interstate commerce, not just that the facility itself possess[ed] the capability of affecting interstate commerce." Pet. App. 26a; see *id.* at 8a-26a. The court held that the government had "satisfied its evidentiary burden" by introducing "expert testimony that the telephone calls to Valoze's cellular phone traveled through a switching center in Jacksonville, Florida before reaching their final destination." *Id.* at 27a. The court further held that the jury instruction on the interstate-commerce jurisdictional element was erroneous, but that the instructional error was harmless. See *id.* at 29a-32a.

b. On February 3, 2004, the court of appeals issued an order vacating the panel opinion and granting rehearing en banc. Pet. App. 65a.

c. In September 2004, while the case was pending before the en banc court of appeals, petitioner filed in the court of appeals a Motion for Remand for Re-Sentencing in light of this Court's decision in *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004). See Pet. App. 99a-102a. Petitioner contended that his sentence was unconstitutional under *Blakely* because the district court had enhanced that sentence based on the court's factual finding that petitioner had testified falsely at trial. See *id.* at 99a, 101a-102a. Petitioner also noted that this Court had recently granted petitions for writs of certiorari in *United States* v. *Booker*, No. 04-104, and *United States* v. *Fanfan*, No. 04-105. See Pet. App. 102a.

d. After the court of appeals granted rehearing en banc, but before the en banc court issued any ruling, Congress amended 18 U.S.C. 1958(a) to replace the phrase "facility in" with "facility of." See Pet. App. 67a; note 1, *supra*. That amendment "ma[de] clear that

§ 1958 now establishes federal jurisdiction whenever any 'facility of interstate commerce' is used in the commission of a murder-for-hire offense, regardless of whether the use is interstate in nature (i.e. the phone call was between states) or purely intrastate in nature (i.e. the phone call was made to another telephone within the same state)." Pet. App. 67a.

On January 14, 2005, the en banc court of appeals vacated its prior grant of rehearing en banc. Pet. App. 66a-67a. In light of the intervening amendment to 18 U.S.C. 1958(a), the court of appeals concluded that this case no longer presented an issue of sufficient importance to warrant en banc review. Pet. App. 67a. The court therefore vacated its order of February 3, 2004, insofar as that order had granted rehearing en banc. *Ibid.* Rather than reinstate the panel opinion, however, the court of appeals remanded the case to the panel for further consideration. *Ibid.*

e. On January 18, 2005, on remand from the en banc court, the court of appeals panel again affirmed petitioner's convictions under 18 U.S.C. 1958. Pet. App. 68a-95a. The court declined to resolve the question whether, under the version of Section 1958 that was in effect when petitioner made the telephone calls to Agent Valoze (and which is therefore controlling in the instant prosecution), the government was required to prove that the telephone signal crossed state lines. The court found it unnecessary to decide that issue because any such requirement was satisfied in this case, since the government's undisputed expert testimony established that each of the four calls was routed through Jacksonville, Florida. See *id.* at 80a-82a. The court of appeals also concluded, for essentially the same reason, that it was unnecessary to determine whether the jury instruc-

tions on the interstate-commerce element were defective because any instructional error was harmless beyond a reasonable doubt. See *id.* at 83a-85a.

f. Also on January 18, 2005, the court of appeals issued a separate order denying petitioner's motion to remand for resentencing. Pet. App. 103a-104a. The court explained that petitioner had failed to challenge his sentence in his opening brief, see *id.* at 103a, and that, under circuit precedent, "issues not raised in the initial brief are deemed abandoned," *id.* at 104a. The court of appeals' order denying the motion to remand did not cite this Court's decision in *United States* v. *Booker*, 125 S. Ct. 738 (2005), which had been issued six days earlier.

ARGUMENT

1. Petitioner contends (Pet. 5-12) that the Eleventh Circuit's practice of treating as abandoned *Booker* and *Blakely* claims that are not raised in a party's initial brief is inconsistent with *Griffith* v. *Kentucky*, 479 U.S. 314 (1987), and with this Court's statement in *Booker* that courts "must apply [its] holding * * * to all cases on direct review." 125 S. Ct. at 769. Petitioner also asserts (Pet. 8-9) that the majority of courts of appeals have considered *Booker* claims on the merits even when a defendant's challenge to his sentence was not raised in his opening brief. Petitioner's contentions lack merit, and further review is not warranted.

a. i. In *Griffith*, this Court held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases * * * pending on direct review or not yet final." 479 U.S. at 328. Because the petitioner in *Griffith* had preserved the claim on which he sought review, the Court did not have occasion to consider the

interplay between that retroactivity rule and prudential doctrines such as principles of waiver and forfeiture. See *id.* at 317, 318.

Application of procedural default rules is consonant with the retroactivity rule announced in *Griffith*. The Court in *Griffith* concluded that retroactive application of new rules on direct appeal was necessary both because of "the nature of judicial review" and in order to "treat[] similarly situated defendants the same." 479 U.S. at 323. That rationale is in no way inconsistent with application of procedural default rules to bar consideration of claims that have not been adequately preserved. A defendant who has abandoned a claim of error is not "similarly situated" (*id.* at 323) to a defendant who has preserved the claim. Cf. *Shea* v. *Louisiana*, 470 U.S. 51, 59-60 (1985) (holding that it is not inequitable to draw a distinction between a defendant who raises a claim on collateral attack and one who raises it on direct review because "[t]he one litigant already has taken his case through the primary system" and "[t]he other has not").

Because the question whether a particular claim is properly before an appellate court is distinct from the question of what law applies to the adjudication of the claim, application of procedural bar rules does not offend principles requiring the retroactive application of new constitutional rules to cases open on direct review:

> Retroactivity doctrine answers the question of which cases a new decision applies to, assuming that the issue involving that new decision has been timely raised and preserved. Procedural bar doctrine answers the question of whether an issue was timely raised and preserved, and if not, whether it should be decided anyway. It makes no more sense to say that a procedural bar should not be applied in this situa-

> tion because doing so undermines or frustrates retroactive application of a Supreme Court decision, than it does to say that procedural bars should not be applied in any situation because doing so undermines or frustrates the constitutional doctrines and commands underlying the issue that is held to be defaulted.

United States v. *Ardley*, 273 F.3d 991, 992 (11th Cir. 2001) (Carnes, J., concurring in denial of rehearing en banc), cert. denied, 535 U.S. 979 (2002).

On several occasions, this Court has indicated that the retroactivity principle embodied in *Griffith* does not preclude the application of procedural default rules. In *Shea*, for example, the Court held that the rule announced in *Edwards* v. *Arizona*, 451 U.S. 477 (1981), would be applied retroactively to cases pending on direct review. 470 U.S. at 59. The Court noted, however, that the retroactive application of *Edwards* was "subject, of course, to established principles of waiver, harmless error, and the like." *Id.* at 58 n.4; see *Johnson* v. *United States*, 520 U.S. 461, 467 (1997) (explaining that, while the rule announced in *United States* v. *Gaudin*, 515 U.S. 506 (1995), applied retroactively under *Griffith*, unpreserved claims were subject to review only for plain error); *Harper* v. *Virginia Dep't of Taxation*, 509 U.S. 86, 105 n.1 (1993) (Scalia, J., concurring) (noting, as the Court extended the holding of *Griffith* to civil cases, that "a party may procedurally default on a claim in either

[the civil or criminal] context").[2] Petitioner cites no case in which this Court has suggested a contrary rule.

ii. Petitioner contends (Pet. 6, 8) that the decision below is inconsistent with this Court's direction in *Booker* that the holding of that case is to be applied "to all cases on direct review." 125 S. Ct. at 769. That argument lacks merit. In *Booker*, the Court merely indicated that, in keeping with *Griffith*, the rule applied to all cases on direct review; the Court did not indicate that the rule would have the same effect in every case regardless of whether a defendant had preserved a *Booker* claim. Indeed, the Court stated that it "expect[ed] reviewing courts to apply ordinary prudential doctrines" in resolving future *Booker* claims and to "determin[e], for example, whether the issue was raised below and whether it fails the 'plain error' test." *Ibid.*

b. Petitioner contends (Pet. 8-9) that most courts of appeals to consider the question have addressed *Booker* claims on the merits even when no such claim was raised in the defendant's opening brief, and that this Court's review is necessary to resolve the circuit conflict.

i. The Federal Rules of Appellate Procedure provide that an appellant's brief "must contain * * * appellant's contentions and the reasons for them." Fed. R. App. P. 28(a)(9)(A). The courts of appeals have uni-

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[2] Accord, *e.g.*, *United States* v. *Humphrey*, 287 F.3d 422, 442 (6th Cir. 2002) (noting that, although *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), applies retroactively to cases on direct review, unpreserved claims were subject to plain-error review); *United States* v. *Oaten*, 286 F.3d 622, 634 (2d Cir. 2002) (same); *United States* v. *Wheat*, 278 F.3d 722, 739 (8th Cir. 2001) (same), cert. denied, 537 U.S. 850 (2002); *United States* v. *Keys*, 133 F.3d 1282, 1285-1286 (9th Cir.) (en banc) (holding that, although rule of *Gaudin* applied retroactively to cases on direct review, unpreserved claims were subject to review only for plain error), cert. denied, 525 U.S. 891 (1998).

formly interpreted that provision to establish a general prudential rule that "[a]n appellant waives any issue which it does not adequately raise in its initial brief." *Playboy Enters., Inc.* v. *Public Serv. Comm'n*, 906 F.2d 25, 40 (1st Cir.), cert. denied, 498 U.S. 959 (1990).[3] The

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[3] Accord, *e.g.*, *United States* v. *Quiroz*, 22 F.3d 489, 490-491 (2d Cir. 1994) ("It is well established that an argument not raised on appeal is deemed abandoned, and we will not ordinarily consider such an argument unless manifest injustice otherwise would result.") (internal citations and quotation marks omitted); *Ghana* v. *Holland*, 226 F.3d 175, 180 (3d Cir. 2000) ("It is well settled that if an appellant fails to comply with these [Rule 28] requirements on a particular issue, he normally has abandoned and waived that issue on appeal.") (quoting *Kost* v. *Kozakiewicz*, 1 F.3d 176, 182 (3d Cir. 1993)) (alterations omitted); *Shopco Distrib. Co.* v. *Commanding Gen. of Marine Corps Base*, 885 F.2d 167, 170 n.3 (4th Cir. 1989) (holding that any claim not raised in a party's initial brief will be deemed waived) (collecting authorities); *United States* v. *Miranda*, 248 F.3d 434, 443 (5th Cir. 2001) ("Failure to satisfy the requirements of Rule 28 as to a particular issue ordinarily constitutes abandonment of the issue."), cert. denied, 534 U.S. 980 (2001) and 1086 (2002); *Bickel* v. *Korean Air Lines Co.*, 96 F.3d 151, 153 (6th Cir. 1996) ("We normally decline to consider issues not raised in the appellant's opening brief.") (quoting *Priddy* v. *Edelman*, 883 F.2d 438, 446 (6th Cir. 1989)), cert. denied, 519 U.S. 1093 (1997); *Holman* v. *Indiana*, 211 F.3d 399, 406 (7th Cir.) (finding arguments not raised in initial brief waived), cert. denied, 531 U.S. 880 (2000); *Sweat* v. *City of Fort Smith*, 265 F.3d 692, 696 (8th Cir. 2001) ("[C]laims not raised in an initial appeal brief are waived."); *Greenwood* v. *FAA*, 28 F.3d 971, 977 (9th Cir. 1994) ("We review only issues which are argued specifically and distinctly in a party's opening brief."); *Adams-Arapahoe Joint Sch. Dist. No. 28-J* v. *Continental Ins. Co.*, 891 F.2d 772, 776 (10th Cir. 1989) (holding that "[a]n issue not included in either the docketing statement or the statement of issues in the party's initial brief is waived on appeal"); *Maryland People's Counsel* v. *FERC*, 760 F.2d 318, 319-320 (D.C. Cir. 1985) (deeming an issue waived where a party did not raise it until supplemental briefing); *Becton Dickinson & Co.* v. *C.R. Bard, Inc.*, 922 F.2d 792, 800 (Fed. Cir. 1990) ("[A]n issue not raised by an appellant in its opening brief * * * is waived.").

courts of appeals have recognized, however, that courts have discretionary authority to address issues not timely raised by the parties. See, *e.g.*, *United States* v. *Miranda*, 248 F.3d 434, 443-444 (5th Cir. 2001) (noting that "the issues-not-briefed-are-waived rule is a prudential construct that requires the exercise of discretion," and that the court may consider an issue that was not timely raised "where substantial public interests are involved"), cert. denied, 534 U.S. 980 (2001) and 1086 (2002); *United States* v. *Quiroz*, 22 F.3d 489, 490-491 (2d Cir. 1994) (court will review an issue not raised in the brief where manifest injustice would otherwise result); *Leer* v. *Murphy*, 844 F.2d 628, 634 (9th Cir. 1988) (same); Fed. R. App. P. 2 (granting courts discretion to suspend most rules for "good cause").

Consistent with that general approach, the Eleventh Circuit has recognized that it has the authority to relieve litigants of the consequences of default and to address an issue on the merits where manifest injustice would otherwise result.[4] In the exercise of its discretion, however, the Eleventh Circuit has declined to exempt *Booker* and *Blakely* claims from the operation of its longstanding rule that it will not consider claims unless they were timely raised in the appellant's opening brief. See, *e.g.*, *United States* v. *Dockery*, 401 F.3d 1261, 1262-

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[4] See, *e.g.*, *United States* v. *Rivera Pedin*, 861 F.2d 1522, 1526 n.9 (11th Cir. 1988) (considering, pursuant to Federal Rule of Appellate Procedure 2, an issue raised only in co-defendant's brief, despite defendant's failure to adopt by reference his co-defendant's arguments); *Gramegna* v. *Johnson*, 846 F.2d 675 (11th Cir. 1988) (vacating judgment based on issue raised sua sponte by the court, pursuant to Rule 2); *United States* v. *Levy*, 391 F.3d 1327, 1335 (11th Cir. 2004) (Hull, J., concurring in denial of rehearing en banc) ("The issue is not whether this Court has the power to consider issues not raised in the initial brief; of course it does."), vacated and remanded, 125 S. Ct. 2542 (2005).

1263 (11th Cir. 2005); *United States* v. *Levy*, 379 F.3d 1241, 1243 n.3 (11th Cir. 2004) ("'there would be no miscarriage of justice if we decline to address' *Blakely*-type issues not raised in opening briefs on appeal") (quoting *McGinnis* v. *Ingram Equip. Co.*, 918 F.2d 1491, 1496 (11th Cir. 1990)), vacated and remanded, 125 S. Ct. 2542 (2005); see also *Ardley*, 242 F.3d at 990 (declining to exempt claims under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), from operation of rule).

Petitioner asserts that "[t]he majority of Circuits to consider the issue have followed this Court's direction and applied *Booker*'s holdings regardless of whether a defendant raised *Booker* or *Blakely* issues in his or her brief." Pet. 8; see Pet. 8-9 (citing cases). Most of the decisions on which petitioner relies, however, simply address *Booker* claims on the merits without citing or discussing the general rule that courts will not entertain issues not raised in a party's opening brief.[5] Petitioner cites only one case (Pet. 9), *United States* v. *Washington*, 398 F.3d 306, 312 n.7 (4th Cir. 2005), in which a court of appeals has explicitly construed *Booker* to override the usual prudential rule that issues not raised in an opening brief will be deemed abandoned. That statement in *Washington* was made without briefing or argument by the parties on the issue. The government was unable to seek rehearing in that case because the court of appeals, after the time for filing a petition for rehearing had expired, denied the timely filed joint motion of the parties for an extension of time in which to file a rehearing petition. The Fourth Circuit should be given an

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[5] See *United States* v. *Paladino*, 401 F.3d 471, 481 (7th Cir. 2005); *United States* v. *Ameline*, 400 F.3d 646, 651-652 (9th Cir. 2005); *United States* v. *Oliver*, 397 F.3d 369, 377 n.1 (6th Cir. 2005); *United States* v. *Crosby*, 397 F.3d 103, 119 (2d Cir. 2005).

opportunity to reconsider its erroneous conclusion in an appropriate case."

ii. In any event, rules governing the proper treatment of claims that are not raised in a defendant's opening brief but are supported by intervening precedent may appropriately be viewed as local rules that can differ from circuit to circuit. So long as local rules are reasonable, see *Thomas* v. *Arn*, 474 U.S. 140, 146-148 (1985), and consistent with Acts of Congress and the Federal Rules of Appellate Procedure, see Federal Rule of Appellate Procedure 47(a), there is no requirement of "uniformity among the circuits in their approach to [such] rules." *Ortega-Rodriguez* v. *United States*, 507 U.S. 234, 251 n.24 (1993). Indeed, this Court has specifically recognized the power of courts of appeals to adopt rules restricting the consideration of issues not raised in a timely manner. In *Thomas*, the Sixth Circuit had pro-

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[6] Some courts of appeals currently are refining their analysis of when it is appropriate to consider tardily raised claims based on intervening precedent. The Fifth Circuit, which previously had entertained such claims, see, *e.g.*, *United States* v. *Miranda*, 248 F.3d 434, 443-444 (2001), cert. denied, 534 U.S. 980 (2001) and 1086 (2002), recently has followed Eleventh Circuit precedent to conclude that "absent extraordinary circumstances, we will not consider *Booker* issues raised for the first time in a petition for rehearing." *United States* v. *Taylor*, No. 03-10167, 2005 WL 1155245 (5th Cir. May 17, 2005) (per curiam) (citing, *inter alia*, *Ardley*); see *United States* v. *Hernandez-Gonzalez*, 405 F.3d 260, 261-262 (5th Cir. 2005) (per curiam) (citing, *inter alia*, *Levy* and *Ardley*); *United States* v. *Lewis*, No. 04-10102, 2005 WL 1394949 (5th Cir. June 14, 2005) (per curiam) (following *Taylor*). The First Circuit, on the other hand, recently concluded that the "substantial change in the applicable law wrought by the Supreme Court's decisions in *Blakely* and *Booker* * * * constitutes an 'exceptional circumstance'" in which the court would decline to apply its general rule that tardily raised issues "are generally considered waived." *United States* v. *Vazquez-Rivera*, 407 F.3d 476, 487 (1st Cir. 2005).

mulgated a rule providing that a party who failed to object in the district court to a magistrate's recommendation thereby waived the right to appellate review of a district court judgment adopting that recommendation. 474 U.S. at 144. This Court held that the Sixth Circuit had not abused its discretion by adopting that rule. See *id.* at 145-155.

The Sixth Circuit's "nonjurisdictional waiver provision," like the rule at issue here, would ordinarily "preclud[e] appellate review of any issue" not raised in the manner prescribed, although the court of appeals could "excuse the default in the interests of justice." 474 U.S. at 147-148, 155. Noting that such a rule was supported by sound considerations of judicial economy, *id.* at 148, this Court concluded that the courts of appeals may adopt "procedures deemed desirable from the viewpoint of sound judicial practice although in nowise commanded by statute or by the Constitution." *Id.* at 146-147 (quoting *Cupp* v. *Naughten*, 414 U.S. 141, 146 (1973)). Similarly, procedural bar rules of the sort at issue here promote efficiency by avoiding piecemeal briefing of appeals and ensuring that the appellee has the opportunity to respond to all issues raised by the appellant without supplemental briefing. Such rules are especially important because of the courts of appeals' increasingly heavy caseloads.

c. This Court has denied review in a number of cases in which the Eleventh Circuit declined to entertain a claim under the intervening decisions in *Blakely* or *Apprendi* solely because it was not raised in the petitioner's opening brief, see, *e.g.*, *Ardley* v. *United States*, 535 U.S. 979 (2002) (No. 01-8714); *Nealy* v. *United States*, 534 U.S. 1023 (2001) (No. 01-5152); *Padilla-Reyes* v. *United States*, 534 U.S. 913 (2001) (No.

01-5284), including cases in which the petitioner specifically challenged application of the procedural bar rule in that context. See, *e.g.*, *Phillips* v. *United States*, 536 U.S. 961 (2002) (No. 01-5718) (denying review when petitioner challenged application of rule to bar consideration of *Apprendi* claim); *Garcia* v. *United States*, 534 U.S. 823 (2001) (No. 00-1866) (denying review when Eleventh Circuit declined, on remand from this Court for reconsideration in light of *Apprendi*, to consider claim because it was not raised in initial brief); see also *Thompson* v. *United States*, 535 U.S. 1114 (2002) (No. 01-8603) (challenging application of rule to bar consideration of ex post facto claim). There is no reason for a different result in this case.

In other cases raising the same issue, this Court has granted petitions for writs of certiorari, vacated the judgments of the court of appeals, and remanded for further consideration in light of *Booker*. See *Hembree* v. *United States*, No. 04-1210, 2005 WL 575559 (June 13, 2005); *Dixon* v. *United States*, No. 04-8932, 2005 WL 540062 (June 6, 2005); *Levy* v. *United States*, No. 04-8942, 2005 WL 540692 (June 6, 2005). For two reasons, that approach is unwarranted here.

First, the Eleventh Circuit confirmed in *Dockery* that a remand for further consideration in light of *Booker* does not alter the court of appeals' application of its longstanding rule that issues not raised in an appellant's opening brief are deemed abandoned. See 401 F.3d at 1262; accord, *e.g.*, *United States* v. *Mosley*, No. 04-11189, 2005 WL 1317026, at *1 (11th Cir. June 2, 2005) (reinstating original judgment after this Court granted certiorari, vacated judgment, and remanded for further consideration in light of *Booker*); *United States* v. *Senn*, 128 Fed. Appx. 96 (11th Cir. 2005) (per curiam)

(same).[7] Second, the court of appeals in the instant case denied petitioner's motion to remand for resentencing six days *after* this Court issued its decision in *Booker*. Pet. App. 103a-104a. It is true that the Eleventh Circuit did not cite *Booker* in its order denying the remand motion. But petitioner acknowledges that the court of appeals "was undoubtedly aware [of *Booker*] at the time of the issuance of the order." Pet. 8.

2. Petitioner argues (Pet. 13-27) that this Court should grant review to determine whether the version of 18 U.S.C. 1958(a) that was in effect at the time of his own offenses (*i.e.*, in August 2001, see pp. 2-3, *supra*) required proof that a communication furthering the offense traveled in interstate commerce. Petitioner correctly identifies (Pet. 14-15) a circuit conflict on that question. See Pet. App. 78a (discussing circuit conflict); compare *United States* v. *Weathers*, 169 F.3d 336, 339-343 (6th Cir.) (holding that prior version of Section 1958(a) required proof of a communication in interstate commerce), cert. denied, 528 U.S. 838 (1999), with *United States* v. *Richeson*, 338 F.3d 653, 660-661 (7th Cir.) (holding that former Section 1958(a) required proof that a facility of interstate commerce, such as a telephone, was used in the offense, not that a particular communication passed in interstate commerce), cert. denied, 540 U.S. 934 (2003); *United States* v. *Marek*, 238 F.3d 310, 315-323 (5th Cir.) (same), cert. denied, 534

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[7] The Fifth Circuit has taken the same approach. See *Taylor*, 2005 WL 1155245, at *1 (on remand from this Court for reconsideration in light of *Booker*, Fifth Circuit reinstated original judgment because defendant had raised *Booker* argument for the first time in petition for a writ of certiorari and "extraordinary circumstances" did not warrant relief); *Lewis*, 2005 WL 1394949, at *1 (same).

U.S. 813 (2001). For two reasons, the question presented does not warrant this Court's review.

First, because the 2004 statutory amendment (see note 1, *supra*) has eliminated any ambiguity in Section 1958(a) with respect to offenses committed after the amendment's effective date, the question presented is one of slight and diminishing practical importance. Petitioner notes (Pet. 27) that the former version of Section 1958(a) will apply to pending and future trials and appeals involving alleged pre-amendment violations. This Court's resolution of the question presented, however, would affect the outcome only of cases involving purely intrastate use of facilities of interstate commerce. Petitioner offers no reason to believe that any significant number of such cases involving pre-amendment conduct remain pending in the federal system.

Second, this case would in any event be an inappropriate vehicle for resolution of the question presented, even if that issue otherwise warranted this Court's review. After this case was remanded to the panel by the en banc court of appeals, the Eleventh Circuit held that it need not decide which interpretation of former Section 1958(a) was correct because petitioner's convictions would be affirmed under either construction. See Pet. App. 80a-85a; p. 6, *supra*. The court based that conclusion on undisputed "expert testimony that each of the four calls [petitioner] placed to Agent Valoze's cellular phone was routed from Georgia through [a] Jacksonville, Florida switching center, and then back into Georgia." Pet. App. 80a-81a.[5] Because the outcome of this case

[5] Petitioner's claim of a circuit conflict on the construction of former 18 U.S.C. 1958(a) rests on the Sixth Circuit's decision in *Weathers*. See Pet. 14-15. After concluding that former Section 1958(a) required proof of a communication in interstate commerce, however, the court in

would have been the same if the court of appeals had adopted petitioner's proposed construction of former Section 1958(a), the interpretive question presented in the certiorari petition does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 2005

Weathers found the statute's jurisdictional element to be satisfied by proof that a telecommunications company had facilitated a telephone call between persons within the same State "by sending a search signal to communications equipment in another state to locate Weathers's cellular telephone." 169 F.3d at 342. There is consequently no reason to believe that petitioner's appeal of his convictions would have been resolved differently if this case had arisen in the Sixth Circuit.

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No. 04-1438

In the Supreme Court of the United States

CARL M. DRURY, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY ARGUMENT 1

CONCLUSION 9

TABLE OF AUTHORITIES

Cases

Alexis v. United States,
125 S.Ct. 2927 (June 13, 2005) (Mem.) 7

Baussan v. United States,
125 S.Ct. 2982 (June 27, 2005) (Mem.) 7

Desist v. United States,
394 U.S. 244 (1969) 2

Griffith v. Kentucky,
479 U.S. 314 (1987) 1, 2, 3

Hembree v. United States,
125 S.Ct. 1904 (June 13, 2005) (Mem.) 7

Johnson v. Zerbst,
304 U.S. 458 (1938) 4

Stutson v. United States,
516 U.S. 193 (1996) 8

United States v. Ardley,
273 F.3d 991 (11th Cir. 2001) 2, 7

United States v. Booker,
___ U.S. ___, 125 S.Ct. 738 (2005) 1, 3, 4, 6, 9

United States v. Hernandez-Gonzalez,
405 F.3d 260 (5th Cir. 2005) 5

United States v. Higdon,
No. 03-14365, 2005 WL 1677544
(11th Cir. July 8, 2005) 3, 5, 7

United States v. Levy,
391 F.3d 1327 (11th Cir. 2004) 2, 4, 6, 7

United States v. Lewis,
No. 04-10102, 2005 WL 1394949
(5th Cir. June 14, 2005) 5

United States v. Olano,
507 U.S. 725 (1993) 4

United States v. Pipkins,
No. 02-14306, 2005 WL 1421449
(11th Cir. June 20, 2005) 7

United States v. Sanchez,
269 F.3d 1250 (11th Cir. 2001) 4, 6

United States v. Taylor,
409 F.3d 675 (5th Cir. 2005) 5

United States v. Vanorden,
No. 03-11083, 2005 WL 1531151
(11th Cir. June 30, 2005) 1, 6

Statutes

18 U.S.C. § 1958 . . . . . 8, 9, 10

Rules

Federal Rule of Criminal Procedure Rule 52(b) 4

REPLY ARGUMENT

1. Petitioner submitted that his case should be remanded for resentencing pursuant to *United States v. Booker*, ___ U.S. ___, 125 S.Ct. 738 (2005) to correct Petitioner's sentence based upon facts found by the sentencing judge, and not facts admitted by Petitioner nor found by a jury beyond a reasonable doubt. (Pet. 5-12.) Respondent does not contest the illegality of Petitioner's sentence under *Booker*. (Resp. 7-17.) I, but instead, Respondent mounts an extended defense of the unique practice employed by the Eleventh Circuit to deny review to all defendants who did not raise *Booker* claims in their opening briefs. (*Id.*) Petitioner submits that this practice is contrary to the clear holdings of this Court, inconsistent with every other circuit court of appeals, and an imprudent and extraordinary exercise of a prudential rule. As Eleventh Circuit Judge Tjoflat recently wrote, the Eleventh Circuit is applying a "strange, bad rule," *United States v. Vanorden*, No. 03-11083, 2005 WL 1531151, at *2 (11th Cir. June 30, 2005) (Tjoflat, J., specially concurring), and that "[h]opefully [the Eleventh Circuit] sitting en banc, or the Supreme Court, will soon correct this practice." *Id.* at 6.

a. Respondent correctly points out that the petitioner in *Griffith v. Kentucky*, 479 U.S. 314 (1987), had preserved his claim on which he sought review under a new rule for criminal prosecutions, (Resp. 7-8), but fails to address the unambiguous language of this Court's holding that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases ... pending on direct review or not yet final." 479 U.S. at 328. This critical language is mirrored in the Court's holding in *Booker*. 125 S.Ct. at 769 (quoting *Griffith*, 479 U.S. at 328). While both *Griffith* and *Booker* recognize that ordinary prudential doctrines should be applied, neither suggest that a defendant must raise the issue

in his initial appellate brief in order to receive the benefit of a new rule. The Eleventh Circuit's rule, however, imposes a new and unprecedented hurdle:

> [T]he panel's decision *narrows* the class of cases entitled to retroactivity. The panel's new rule is that cases are entitled to the benefit of an intervening decision *only if:* 1) the case was not yet final at the time of the intervening decision; *and* 2) the litigant presaged the intervening decision by raising the issue addressed by that decision in the litigant's initial brief on appeal.

United States v. Ardley, 273 F.3d 991, 999 (11th Cir. 2001) (Tjoflat, J., dissenting from denial of rehearing en banc) (emphasis in original). *See also United States v. Levy*, 391 F.3d 1327, 1240 (11th Cir. 2004) (Tjoflat, J., dissenting from denial of rehearing en banc). As another Eleventh Circuit Judge wrote, "Our internal circuit rules for how and whether an issue can be raised on appeal cannot override the concerns about fundamental fairness and the integrity of judicial review that the Supreme Court identified in *Griffith*." *Levy*, 391 F.3d at 1351 (Barkett, J., dissenting from denial of rehearing en banc).

Respondent argues that the Eleventh Circuit is simply applying a "local rule" which can differ from circuit to circuit and is valid so long as reasonable and consistent with the Acts of Congress and the Federal Rules of Appellate Procedure. (Resp. 14-15.) This is contrary to the central teaching of *Griffith* that "selective application of new rules violates the principle of treating similarly situated defendants the same." 479 U.S. at 323 (citing *Desist v. United States*, 394 U.S. 244, 253-254 (1969) (Harlan, J., dissenting)). As Judge Tjoflat recently pointed out in yet another dissent:

> [I]t hardly comports with the ideal of evenhanded justice when similarly situated defendants are treated differently based only on the location of the federal court in which they were sentenced. District courts in the Eleventh Circuit sentence approximately ten percent of all defendants sentenced in the federal courts. Accordingly, while ninety percent of all defendants who did not raise *Blakely/Booker* claims in their initial briefs (for the imminently sensible reason that such claims were squarely foreclosed by then-controlling precedent) will be permitted to raise these now-viable claims in some sort of supplemental filing, the similarly situated ten percent who were sentenced in our circuit will be precluded from doing so for no other reason than that they were sentenced in our circuit.

United States v. Higdon, No. 03-14365, 2005 WL 1677544, at *11 (11th Cir. July 8, 2005) (Tjoflat, J., dissenting from denial of rehearing en banc) (footnotes omitted). Further, as Judge Tjoflat also noted, this procedure will inevitably result in sentencing disparities, thereby frustrating the objectives of Congress in passing the Sentencing Reform Act. *Id.*

The anomalous procedure of the Eleventh Circuit is contrary to this Court's holding that "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." *Griffith*, 479 U.S. at 322. Respondent has failed to explain why *Griffith* does not require that *Booker* be applied to Petitioner's case.

b. Respondent also seeks to justify the Eleventh Circuit's procedure as a "nonjurisdictional waiver provision." (Resp. 14-15.) This is contrary to Federal Rule of Criminal

Procedure 52(b) and this Court's holding in *United States v. Olano*, 507 U.S. 725, 732-733 (1993) that: "If a legal rule was violated during the district court proceedings, and if the defendant did not waive the rule, then there has been an 'error' within the meaning of Rule 52(b) despite the absence of a timely objection." This conclusion is rooted in the distinction: "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the "intentional relinquishment or abandonment of a known right.'" *Olano*, 507 U.S. at 733 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). "Mere forfeiture, as opposed to waiver, does not extinguish an 'error' under Rule 52(b)." *Olano*, 507 U.S. at 733. As Judge Barkett pointed out in *Levy*, it is impossible to preclude a *Booker* claim on the basis of a finding that a defendant has waived an issue that had already been definitively foreclosed by the Eleventh Circuit in *United States v. Sanchez*, 269 F.3d 1250, 1262 (11th Cir. 2001). *Levy*, 391 F.3d at 1354 (Barkett, J., dissenting from denial of rehearing en banc).

The Eleventh Circuit's procedure, which precludes *all* review of *Booker* claims by defendants who are on direct review improperly denies even review for plain error. The Eleventh Circuit's pre-emptive elimination of review of errors which affect a defendant's substantial rights is inconsistent with the holdings of this Court and the Federal Rules of Criminal Procedure.

c. Respondent does not contest that there is a split among the circuit courts of appeal on this issue. Instead, Respondent argues that the Fifth Circuit, which had previously entertained *Booker* claims raised after a defendant's opening brief, "recently has followed Eleventh Circuit precedent" to deny such claims "absent extraordinary circumstances." (Resp. 14 n.6.) A careful examination of the three Fifth Circuit cases

Respondent relies on, *United States v. Taylor*, 409 F.3d 675, 677 (5th Cir. 2005) (per curiam), *United States v. Hernandez-Gonzalez*, 405 F.3d 260, 261-262 (5th Cir. 2005), and *United States v. Lewis*, No. 04-10102, 2005 WL 1394949, at *1 (5th Cir. June 14, 2005) (per curiam), reveals that the Fifth Circuit reviewed each defendant's claim for plain error before determining that whether the defendant could establish "extraordinary circumstances." Under the Eleventh Circuit rule, the presence or absence of plain error is irrelevant to review. *See Higdon*, 2005 WL 1677544, at *9 n.9 (Tjoflat, J., dissenting from denial of rehearing en banc).

Respondent argues that most of the circuits "simply address *Booker* claims on their merits without citing or discussing the general rule that courts will not entertain issues not raised in a party's opening brief." (Resp. 13.) However, as Judge Tjoflat recently pointed out, "Post-*Booker*, it continues to be clear that [the Eleventh Circuit's] approach is contrary to that of every other circuit." *Higdon*,, at *8 (collecting cases).

This is not a simple matter of a "local rule" adopted by the Eleventh Circuit. (Resp. 14.) Rather, the Eleventh Circuit procedure invokes a rule which precludes *all* review of *Booker* claims by defendants who failed to raise the issue in their initial brief before that court. It is the effect of this procedure and the consequential disparate treatment between defendants in the Eleventh Circuit and every other circuit that establishes the conflict that justifies granting this petition.

d. Respondent also argues the Eleventh Circuit rule promotes judicial efficiency by avoiding piecemeal briefing. (Resp. 15.) Petitioner's case does not involve an effort to raise an issue that could or should have been raised in his initial brief. It involves an issue which was completely

foreclosed by en banc Eleventh Circuit precedent at the time his initial brief was filed. *Sanchez*, 269 F.3d at 1262. Rather, Petitioner seeks only what defendants in every other circuit currently enjoy: review under the new rule announced by this Court in *Booker* which this Court held must be applied "to all cases on direct review." 125 S.Ct. at 769.

Moreover, as recognized by Judge Tjoflat, the Eleventh Circuit's procedure will "encourage[ ] defendant-appellants to raise frivolous claims that are squarely foreclosed by circuit and Supreme Court precedent on the off chance that an unanticipated decision will make them suddenly viable." *Vanorden*, 2005 WL 1531151 at *2 (Tjoflat, J., concurring specially); *see also Levy*, 391 F.3d at 1348 (Tjoflat, J., dissenting from denial of rehearing en banc). As a consequence, Judge Tjoflat concluded, "the rule will do great harm to the fair and efficient administration of justice in this circuit." *Levy*, 391 F.3d at 1350.

e. Finally, Respondent argues that this Court should not even accord Petitioner the opportunity this Court has routinely granted other petitioners in his precise situation. Although this is Petitioner's first application for certiorari, Respondent contends that this Court's practice of vacating petitioners' convictions and remanding for further consideration in light of *Booker* should not apply to Petitioner Drury's case for two reasons.

First, Respondent argues that a remand will make no difference to the Eleventh Circuit, which has refused to alter its rule precluding review. (Resp. 16.) The Eleventh Circuit's intransigence on this issue should not constitute a basis to deny Petitioner's case full review under *Booker*, nor to truncate proceedings in his case on direct review so as to possibly deprive Petitioner of the effect of a subsequent

opinion that brings the Eleventh Circuit in line with the other circuits. As demonstrated by the dissents from denial of rehearing en banc in *Ardley, Levy,* and *Higdon*, this issue is hotly contested within the Eleventh Circuit and has not been settled definitively by that court sitting en banc. Pursuant to a GVR Order by this Court, the Eleventh Circuit may select Petitioner's case as the vehicle to re-examine its anomalous procedure. Petitioner deserves *all* his days in court, not just those on which he is likely to prevail, for, as the Eleventh Circuit itself stated in yet another recent application of its "strange and bad rule:" "It is through this process that the law evolves." *United States v. Pipkins*, No. 02-14306, 2005 WL 1421449, at *1 (11th Cir. June 20, 2005).

Second, Respondent argues, this Court should deny this petition outright because the Eleventh Circuit denied Petitioner's *Booker* claim six days after *Booker* was decided and Petitioner stated in his initial petition in this Court, (Pet. 8), that the court of appeals was undoubtedly aware of *Booker* at the time of its denial. (Resp. 17.) Neither of these contentions supports any conclusion that the court of appeals *reviewed* Petitioner's claim in light of *Booker*. The denial of Petitioner's motion by the Eleventh Circuit, which did not cite *Booker*, (Pet. App. 103a-104a), appears to have ~~been a pro-forma~~ denial based on the Eleventh Circuit's rule. By its own statement of its procedure, the Eleventh Circuit "does not *consider Blakely,* now *Booker*, issues not raised in any way in a party's initial brief." *Levy*, 2005 WL 1620719, at *5. This Court has continued to routinely enter GVR Orders in such caseseven those emanating from the Eleventh Circuit--notwithstanding the timing of the Eleventh Circuit's action on the initial *Booker* claim vis-à-vis the date that *Booker* was handed down. *See, e.g., Baussan v. United States*, 125 S.Ct. 2982 (June 27, 2005) (Mem.); *Alexis v. United States*, 125 S.Ct. 2927 (June 13, 2005) (Mem.); *Hembree v. United*

States, 125 S.Ct. 1904 (June 13, 2005) (Mem.). There is no justification for excluding Petitioner's case from this orderly procedure, and Respondent offers none. *See also Stutson v. United States*, 516 U.S. 193, 197 (1996) ("[A] GVR order guarantees to the petitioner full and fair consideration of his rights in light of all pertinent considerations....").

2. Respondent also opposes Petitioner's second ground for certiorari, relating to the question of whether the version of 18 U.S.C. § 1958(a) in effect at the time of the events forming the basis for Petitioner's conviction should require proof that a communication furthering the offense traveled in interstate commerce. (Resp. 17-18.) Respondent concedes that there is a circuit conflict on this issue, (Resp. 17), but argues that since a 2004 statutory amendment eliminated the ambiguity, the question would affect only the outcome of cases involving the former statute and is, therefore, "of slight and diminishing practical importance." (Resp. 18.)

While the number of cases prosecuted under the previous version of § 1958(a) may diminish over time, Respondent does not demonstrate they are insignificant in number. Based on Justice Department statistics, from 2000 to 2003 (the most recent year available), there were approximately 26 indictments brought each year where murder-for-hire under the former § 1958 was the most serious charge. Federal Justice Statistics Resource Center, http://fjsrc.urban.org/newweb/t_sec/t_sec.cfm. Since crimes under former § 1958 could still be indicted up until December of 2009 under the applicable statute of limitations, and there are undoubtedly numerous cases from at least the past several years which are still awaiting trial or on direct appeal, the number of affected cases is far from insignificant.

Moreover, such cases often involve applications of the former statute where, as in Petitioner's case, the basis for asserting federal jurisdiction is tenuous at best, and the policy justifications for federal prosecution of purely intrastate criminal activity are non-existent. For example, this issue is currently in play in a high profile prosecution under the former version of § 1958 within the Eleventh Circuit, involving the murder of a Georgia sheriff-elect by several hit men (all acquitted in a state prosecution), who made several calls to one another while within the State of Georgia using cellular phones. *See* Bill Torpy, "U.S. Opens Trial in Derwin Brown's Killing," The Atlanta Journal-Constitution (July 11, 2005), http://www.ajc.com/metro/content/metro/dekalb/0705/11trial.html.

Respondent's second argument, that Petitioner's case is an inappropriate vehicle for the resolution of the question presented because the court of appeals would have affirmed his conviction under either construction of the statute, (Resp. 18-19), misstates Petitioner's question as presented. Petitioner clearly articulated the broader question of whether that interstate use "required a showing that a facility was actually used in interstate commerce in a manner involving more than a purely incidental or inadvertent crossing of State borders." (Pet. i; *see also* Pet. 27.)

CONCLUSION

For the reasons set forth in Petitioner's first issue, this Court should grant his petition for certiorari, vacate the decision below, and remand for further proceedings in light of *Booker*. In the alternative, this Court should grant his petition for certiorari and resolve the increasingly important question of the validity of the Eleventh Circuit's procedure in

Booker appeals. For the reasons set forth in Petitioner's second issue, this Court should grant his petition for writ of certiorari to resolve the conflict in the circuits as to the requisite showing as to interstate commerce under the former 18 U.S.C. § 1958.

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3

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI 1

REASONS FOR GRANTING THE PETITION FOR REHEARING 2

1. Whether the Eleventh Circuit's Rule that Issues Not Raised in the Initial Brief are Forever Forfeited Is Contrary to this Court's Decision in *United States v. Booker*, and the Position of Other Circuits, where the District Court and the Court of Appeals Applied Mandatory Guidelines pre-*Booker* 2

CONCLUSION 9

CERTIFICATE OF COUNSEL 10

TABLE OF AUTHORITIES

Cases

Reynoldsville Casket Co. v. Hyde,
514 U.S. 749 (1995) 4

United States v. Alexis,
No. 02-00094, 2005 WL 2572391
(11th Cir. Oct. 13, 2005) 2, 7

United States v. Ardley,
242 F.3d 989 (11th Cir. 2001) 2, 5, 6, 7

United States v. Barona,
No. 04-20710, 2005 WL 2471016
(11th Cir. Oct. 7, 2005) 2

United States v. Baxter,
No. 02-60200, 2005 WL 2605403
(11th Cir. Oct. 14, 2005) 2, 7

United States v. Beck,
418 F.3d 1008 (9th Cir. 2005) 4

United States v. Billingslea,
144 Fed.Appx. 98 (11th Cir. 2005) 6

United States v. Booker,
___ U.S. ___, 125 S.Ct. 738 (2005) .....*passim*

United States v. Bordon,
421 F.3d 1202 (11th Cir. 2005) 5

United States v. Campbell,
No. 03-4547, 2005 WL 2596901
(4th Cir. Oct. 13, 2005) 3

United States v. De La Ossa,
No. 03-20834, 2005 WL 2277442
(11th Cir. Sep. 20, 2005) 6

United States v. Dockery,
401 F.3d 1261 (11th Cir. 2005) 2

United States v. Garcia,
144 Fed.Appx. 848 (11th Cir. 2005) 6

United States v. Higdon,
418 F.3d 1136 (11th Cir. 2005) 3, 5, 6

United States v. Hughes,
396 F.3d 374 (4th Cir. 2005) 8

United States v. Jock,
No. 03-6354, 2005 WL 2173822
(6th Cir. Sep. 8, 2005) 4

United States v. Levy,
391 F.3d 1327 (11th Cir. 2004) 5

United States v. McCombs,
No. 03-00055, 2005 WL 2298271
(11th Cir. Sep. 22, 2005) 6

United States v. Meilleur,
No. 03-60111, 2005 WL 2185864
(11th Cir. Sep. 9, 2005) 6

United States v. Miller,
417 F.3d 358 (3d Cir. 2005) 4

United States v. Sanchez,
269 F.3d 1250 (11th Cir. 2001) 7

United States v. Serrata,
Nos. 03-2011, 03-2012, 03-2019,
03-2036, 2005 WL 2462130
(10th Cir. Oct. 6, 2005) 3

United States v. Townsend,
419 F.3d 663 (7th Cir. 2005) 4

United States v. Valdez,
No. 04-3811, 2005 WL 2447942
(2d Cir. Oct. 5, 2005) 3

United States v. Vanorden,
414 F.3d 1321 (11th Cir. 2005) 5, 7

United States v. Vasquez-Alejos,
144 Fed.Appx. 441 (5th Cir. 2005) 3

United States v. Washington,
398 F.3d 306 (4th Cir. 2005) 1, 2, 8

Rules

Federal Rule of Criminal Procedure Rule 52(b) 7

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI

Petitioner hereby moves for rehearing on his petition for a writ of certiorari, pursuant to Rule 44 of the Supreme Court Rules. Intervening decisions demonstrate that the Eleventh Circuit Court of Appeals continues to be in conflict with nearly all other circuit courts of appeals by refusing to apply this Court's holdings in *Blakely v. Washington*, 530 U.S. ___, 124 S.Ct. 2531, 2536 (2004) and *United States v. Booker*, ___ U.S. ___, 125 S.Ct. 738 (2005). The district court here sentenced Petitioner under the mandatory application of the Federal Sentencing Guidelines in violation of the Sixth Amendment to the Constitution. The Eleventh Circuit affirmed the sentence without applying *Booker*. Because *Booker* applies to all cases on direct review, *Booker*, at 769, this Court should grant the petition for rehearing, vacate the judgment and remand the case to the Eleventh Circuit for further consideration in light of *Booker*. In short, Petitioner has never had his case reviewed for error pursuant to *Booker*.

REASONS FOR GRANTING THE PETITION FOR REHEARING

1. **Whether the Eleventh Circuit's Rule that Issues Not Raised in the Initial Brief are Forever Forfeited Is Contrary to this Court's Decision in *United States v. Booker* and the Position of Other Circuits, where the District Court and the Court of Appeals Applied Mandatory Guidelines pre-*Booker***

The Eleventh Circuit Court of Appeals, since this Court's denial of Petitioner's Petition for a Writ of Certiorari, continues to apply its "prudential rule that issues and contentions not timely raised in the briefs are deemed abandoned," *United States v. Dockery*, 401 F.3d 1261, 1262-63 (11th Cir. 2005) (quoting *United States v. Ardley,* 242 F.3d 989, 990 (11th Cir.), *cert. denied,* 533 U.S. 962 (2001)). Therefore, the Eleventh Circuit refuses to consider challenges based upon the Sixth Amendment or the advisory nature of the United States Sentencing Guidelines ("Guidelines") to sentences imposed contrary to this Court's holdings in *Blakely v. Washington*, 530 U.S. ___, 124 S.Ct. 2531, 2536 (2004) and *United States v. Booker*, ___ U.S. ___, 125 S.Ct. 738 (2005). In the case of certain defendants, such as Petitioner, whose cases are pending on direct review or not yet final, those defendants, therefore have never had have their cases reviewed for a violation of the Sixth Amendment, or Booker. *See United States v. Baxter*, No. 02-60200, 2005 WL 2605403, at *1 (11th Cir. Oct. 14, 2005) (per curiam); *United States v. Alexis*, No. 02-00094, 2005 WL 2572391, at *1 (11th Cir. Oct. 13, 2005) (per curiam); *United States v. Barona*, No. 04-20710, 2005 WL 2471016, at *2 n. 2 (11th Cir. Oct. 7, 2005) (per curiam). As recognized by Eleventh Circuit Judge Tjoflat, the Eleventh Circuit's application of this issues-not-briefed-are-waived procedural bar

or default rule is "squarely in conflict" with the handling of *Blakely* and *Booker* claims for similarly situated defendants by nearly every other circuit in the country. *United States v. Higdon*, 418 F.3d 1136, 1145 (11th Cir. 2005) (Tjoflat, J., dissenting from denial of rehearing en banc).

The Second, Fourth, Fifth and Tenth Circuit Courts of Appeals have continued to consider *Blakely* and *Booker* claims in cases where a defendant's case was pending on direct review or not yet final when this Court issued its decisions in *Blakely* and *Booker*, but where the defendant filed an initial or opening brief on appeal prior to the issuance of those decisions, or otherwise failed to include a Sixth Amendment or advisory Guidelines challenge to his or her sentence in the initial brief. *See United States v. Valdez*, No. 04-3811, 2005 WL 2447942, at *4, *8 (2d Cir. Oct. 5, 2005) (holding that remand to district court pursuant to *Booker* to consider whether it would have imposed materially different sentence was appropriate, despite fact that defendant did not assert that his sentence violated the Sixth Amendment on appeal); *United States v. Campbell*, No. 03-4547, 2005 WL 2596901, at *1, *2 (4th Cir. Oct. 13, 2005) (per curiam) (vacating defendant's sentence and remanding for resentencing where defendant raised *Blakely* on petition for rehearing); *United States v. Vasquez-Alejos*, 144 Fed.Appx. 441, **1 (5th Cir. 2005) (per curiam) (reviewing defendant's argument pursuant to *Blakely* for plain error where argument was raised for the first time on remand from the Supreme Court and remanding for resentencing); *United States v. Serrata*, Nos. 03-2011, 03-2012, 03-2019, 03-2036, 2005 WL 2462130, at *26, *32 (10th Cir. Oct. 6, 2005) (per curiam) (applying holdings of *Blakely* and *Booker* to defendants who raised *Blakely* in supplemental brief on appeal, vacating sentences and remanding for resentencing). The Third, Sixth, Seventh and Ninth Circuit Courts of Appeals have also applied *Blakely* and *Booker* to cases where a claim was not raised in the initial brief,

since the filing of Petitioner's Reply Brief,. *See United States v. Miller*, 417 F.3d 358, 361, 363 (3d Cir. 2005) (vacating defendant's sentence and remanding for resentencing where *Blakely* was decided after Court of Appeals had affirmed defendant's sentence); *United States v. Jock*, No. 03-6354, 2005 WL 2173822, at *3, *4 (6th Cir. Sep. 8, 2005) (reviewing defendant's sentencing claims for plain error and remanding for resentencing where *Booker* was decided after defendant was sentenced and while his case was on appeal, vacating sentence and remanding for resentencing); *United States v. Townsend*, 419 F.3d 663, 665 (7th Cir. 2005) (ordering limited remand for sentencing court to determine whether it would have imposed the same sentence under *Booker* had it known that the Federal Sentencing Guidelines were advisory, where defendant raised Booker in supplemental brief on appeal); *United States v. Beck*, 418 F.3d 1008, 1016 (9th Cir. 2005) (remanding defendant's case to district court to determine whether court would impose same sentence, despite the fact that defendant did not initially raise *Booker* issue on appeal).

The Eleventh Circuit's persistent and imprudent use of the procedural bar rule to avoid application of this Court's holdings in *Blakely* and *Booker* in cases pending on direct review or not yet final constitutes an aberrant response to the remedial majority's direction in *Booker* that both the constitutional and remedial holdings be applied "to all cases on direct review." 125 S.Ct. at 769 (citing *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987); *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 752 (1995); *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 97 (1993)), and stands in direct conflict with the practice of other courts of appeals.

In addition, the Eleventh Circuit's refusal to consider *Blakely* or *Booker* challenges has resulted in divisions within the Circuit itself. Eleventh Circuit Judge Tjoflat, in his

dissenting and specially concurring opinions in *Ardley*, 242 F.3d 989 (Tjoflat, J., dissenting from denial of rehearing en banc); *United States v. Levy*, 391 F.3d 1327 (11th Cir. 2004) (Tjoflat, J., dissenting from denial of rehearing en banc); *United States v. Vanorden*, 414 F.3d 1321, 1324 (11th Cir. 2005) (Tjoflat, J., specially concurring) and *United States v. Higdon*, 418 F.3d 1136, 1145 (11th Cir. 2005) (Tjoflat, J., dissenting from denial of rehearing en banc) has criticized the procedural default rule as a "strange, bad rule," *Vanorden* at 1324, and that "[h]opefully [the Eleventh Circuit] sitting en banc, or the Supreme Court, will soon correct this practice," *id.* at 1328. Eleventh Circuit Judge Barkett has also expressed disagreement with the rule. *See Levy*, 391 F.3d 1327 (Barkett, J., dissenting from denial of rehearing en banc).

Since the filing of Petitioner's Reply Brief, Judge Tjoflat and Judge Barkett have been joined in their criticism of the rule by Eleventh Circuit Judge Hill in *United States v. Bordon*, 421 F.3d 1202 (11th Cir. 2005) (per curiam) (Hill, J., concurring). In an unenthusiastic concurrence from the panel's affirmance of the defendants' convictions, in which it had declined (in a footnote) to consider the defendants' *Booker* claim, which had been raised in a notice of supplemental authority pursuant to Federal Rule of Appellate Procedure 28(j), Judge Hill observed that the Eleventh Circuit's procedural bar rule meant that the defendants "should have claimed relief under *Booker*—before *Booker* was decided!" *Id.* at 1208. Voicing his regret over this precedent, Judge Hill stated "I should like to think that a court would want to correct an erroneous sentence of incarceration—if an efficient and prudential method could be devised to do so. We must feel that we cannot. Yet, the other circuits in this country seem to be doing so—and surviving!" *Id.* Judge Hill concluded that "*Stare decisis* is an important doctrine. But I

trust that, from time to time, it might be tempered with *fiat justitia ruat coelum*."1 *Id.* at 1209.

In addition, Judge Tjoflat has persevered in his criticism of the Eleventh Circuit's continued refusal to consider *Blakely* or *Booker* challenges pursuant to its procedural bar rule since the filing of Petitioner's Reply Brief and this Court's denial of his Petition for a Writ of Certiorari. *See United States v. Meilleur*, No. 03-60111, 2005 WL 2185864, at *1 (11th Cir. Sep. 9, 2005) (Tjoflat, J., specially concurring) (where panel applied rule that issues not raised in briefs are deemed abandoned to defendant who raised *Blakely* claim in Rule 28(j) letter, stating that *Ardley* "was wrongly decided and that we should entertain supplemental briefs on *Booker*'s application in this case") (citing *Higdon*, 418 F.3d 1136); *United States v. Garcia*, 144 Fed.Appx. 848, at **1 (11th Cir. 2005) (Tjoflat, J., specially concurring) (reinstating previous opinion affirming conviction where the "first time [the defendant] raised any *Booker*-related issue in any court was in his certiorari petition to the Supreme Court"); *United States v. Gray*, No. 04-11076, 2005 WL 2237698, at *1, *2 (11th Cir. Sep. 15, 2005) (per curiam) (Tjoflat, J., specially concurring) (same, where defendant challenged constitutionality of her sentence under *Blakely* for the first time in her reply brief); *United States v. Billingslea*, 144 Fed.Appx. 98, 99 (11th Cir. 2005) (per curiam) (Tjoflat, J., specially concurring) (same, where defendant failed to raise a constitutional challenge to his sentence or a challenge under *Apprendi v. New Jersey*, 530 U.S. 466 (2000) in his initial brief); *United States v. De La Ossa*, No. 03-20834, 2005 WL 2277442 (11th Cir. Sep. 20, 2005) (per curiam) (Tjoflat, J., specially concurring) (same, where the defendant raised no objection based upon *Apprendi* before Court of Appeals); *United States v. McCombs*, No. 03-00055, 2005 WL 2298271,

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1 "Let justice be done though the heavens will fall."

at *1 (11th Cir. Sep. 22, 2005) (per curiam) (Tjoflat, J., specially concurring) (same, where defendant first raised a constitutional sentencing error in his petition for rehearing en banc); *Alexis*, 2005 WL 2572391 at *1 (Tjoflat, J., specially concurring) (same, where defendant presented arguments concerning *Blakely* in supplemental brief); *Baxter*, 2005 WL 2605403 at *1 (Tjoflat, J., specially concurring) (same, where the defendant asserted no error based upon *Apprendi*).

Through its use of the procedural default rule in cases of *Booker* error pending on direct review or not yet final, the Eleventh Circuit has imposed an additional requirement and narrows the class of defendants who may benefit from the retroactive application of this Court's new rule of criminal procedure announced in *Blakely* and *Booker*, contrary to this Court's holding in *Griffith* and the approach of nearly every other circuit, resulting in inevitable sentencing disparities. *See Ardley*, 273 F.3d at 999 (Tjoflat, J., dissenting from denial of rehearing en banc); 418 F.3d at 1150 (Tjoflat, J., dissenting from denial of rehearing en banc). Furthermore, merely by failing to raise sentencing error, defendants such as Petitioner have not waived any right to challenge such error, since waiver is the "intentional relinquishment or abandonment of a known right.'" *United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)); *see also* Fed.R.Crim.P. 52(b). In addition, prior to this Court's decision in *Blakely*, *Apprendi*-based challenges to sentencing determinations had been completely ruled out by the Eleventh Circuit. *See United States v. Sanchez*, 269 F.3d 1250, 1262 (11th Cir. 2001). The Eleventh Circuit's bad rule will also force criminal appellants in the circuit to anticipate future new rules by raising any and all claims, no matter how frivolous they may be. *See Vanorden*, 414 F.3d at 1324 (Tjoflat, J., specially concurring). In Petitioner's case, "'[t]he fact remains that a sentence has yet to be imposed under a regime in which

the Guidelines are treated as advisory.'" *United States v. Washington*, 398 F.3d 306, 313 (4th Cir. 2005) (quoting *United States v. Hughes,* 396 F.3d 374, 379 n. 8 (4th Cir. 2005)). The Court should now resolve the conflict among the circuit courts of appeals as to whether the procedural default rule may be used to prevent application of this Court's holdings in *Blakely* and *Booker* in cases pending on direct review and not yet final.

At issue for petitioner is not merely some filigree of the doctrine of procedural default. Petitioner was deprived of his Constitutionally protected right to trial by jury. At the time he forfeited that right, neither petitioner, nor his lawyers knew that such rights existed. It was only after this Court's decision in Blakely that petitioner, his lawyers and everyone else for that matter learned of the existence of such Sixth Amendment rights. Petitioner, whose case was on direct appeal, immediately moved for relief before the Eleventh Circuit. That court ruled that petitioner having asserted his claim at the earliest opportunity—had asserted it too late, and had lost it forever. Because the Eleventh Circuit has placed its own rules above this Court's mandate, the petition for certiorari should be granted.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this honorable Court grant his petition for rehearing and his petition for a writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, Thomas A. Withers, hereby certify, pursuant to Rule 44.2 of the Supreme Court Rules, that I am the attorney for Petitioner in this case; that this Petition for Rehearing is limited to intervening circumstances of substantial or controlling effect, or other substantial grounds not previously presented; and that it is presented in good faith and not for delay.

Dated: October 28, 2005.

Respectfully submitted,

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